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Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

THE MIHALEK CORPORATION AND
LAWRENCE PATRICK MIHALEK,
Petitioners

v

THE STATE OF MICHIGAN, GOVERNOR JAMES J. BLANCHARD, THE DEPARTMENT OF COMMERCE OF THE STATE OF MICHIGAN, RALPH J. GERSON, Director, ROSS ROY, INC.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

James M. Deimen, Ph.D., J.D.
Patent, Trademark and Copyright Attorney
Professional Engineer
Burlington Office Center, Suite Two
325 East Eisenhower Parkway
Ann Arbor, Michigan 48108-3397
(313) 66-2-3159

QUESTIONS PRESENTED

1. Are a State of the United States, its political subdivisions, their employees, officers and officials, when sued for money damages and injunctive relief for copyright infringement in violation of the Copyright Act of 1976, entitled to immunity under the Eleventh Amendment to the United States Constitution?

2. Are intellectual property rights considered a property under the Fifth Amendment taking clause of the United States Constitution?

3. What are the standards of the tests for copyright infringement, the taking of intellectual property under the Fifth Amendment and false designation of origin, section 43(a) of the Lanham Act (15 U.S.C. 1125(a)), involving a State of the United States, its political subdivisions, and their employees, officers and officials?

PARTIES TO THE PROCEEDING

THE MIHALEK CORPORATION and
LAWRENCE PATRICK MIHALEK,

Petitioners,

v.

THE STATE OF MICHIGAN, GOVERNER JAMES J. BLANCHARD, THE DEPARTMENT OF COMMERCE OF THE STATE OF MICHIGAN, RALPH J. GERSON, DIRECTOR, ROSS ROY, INC.

Respondents.

RULE 28.1 STATEMENT

Petitioners the Mihalek Corporation and Lawrence Patrick Mihalek, have no parent companies, subsidiaries or affiliates.

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Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Petitioners The Mihalek Corporation and Lawrence Patrick Mihalek, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit.

OPINIONS BELOW

The Court of Appeals' Order of Affirmance is reported at 814 F2d 290, attachment A. The three page Petition For Rehearing in which the court below neglected to reach two undecided issues is marked attachment B. The order denying the Petition for Rehearing, dated June 8, 1987, is marked attachment C. The orders of the District Court are reported at 595 F. Supp. 903, attachment D, and 630 F. Supp. 9, attachment E. The orders of the District Court that are not reported are marked attachments F, G and H. This writ involves four consolidated appeals.

JURISDICTION

The judgment of the Court of Appeals was entered on March 18, 1987; see attachment B. The date of the order respecting a rehearing is June 8, 1987; see attachment C. On September 4, 1987, Petitioners

(hereinafter called "Mihalek") filed an application for an extension of time within which to petition for a writ of certiorari until October 5, 1987. The extraordinary circumstances stated in the application are:

1) Mihalek is unable to pay for or raise the funds necessary to support this appeal, including filing fees and printing costs. Therefore, Mihalek will have to proceed In Forma Pauperis.

2) Undersigned counsel suffered a heart attack in 1985 and developed multiple sclerosis in 1986 and therefore only has a very limited amount of time to help indigent clients. Throughout the progression of this case, the client has prepared the rough drafts of the necessary documents after discussion of the legal points with counsel. Counsel has then edited to final form. Until this week, counsel believed the petition would be timely filed and every attempt will be made to timely file. . .

The application for an extension of time was presented in the event the deadline of September 8, 1987 could not be met.

The jurisdiction of this Honorable Court is invoked under 28 U.S.C. Section 1254(1).

CONSTITUTIONAL PROVISION AND STATUTE INVOLVED

The Fifth Amendment to the United States Constitution provides in part: "nor shall private property be taken for public use, without just compensation."

The Eleventh Amendment to the United States Constitution provides:

> The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State.

Article I, Section 8, Clause 8 to the United States Constitution provides:

> To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries;. . ..Federal Copyright Act, Title 17 U.S.C.

Federal Trademark Act, Title 15 U.S.C. Section 1125(a) provides in relevant part as follows:

> Any person who shall. . . use in connection with any goods or services, or any container or containers for goods, . . . any false description or representation, including words or other symbols tending falsely to describe or represent the same . . . shall be liable to a civil action by . . . any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

28 U.S.C. Section 1338(a) provides:

> The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases.

STATEMENT

The federal jurisdiction in the court of first instance was founded upon Title 28 USC Sections 1331 and 1338. The action arises under the Fifth Amendment to the United States Constitution; Title 15 of the United States Code (The Lanham Act trademarks) and Title 17 of the United States Code (The Copyright Act). Ancillary claims arise under trade secret, unfair competition, and misappropriation of work product. The matter in controversy exceeds the sum of Ten Thousand Dollars exclusive of interest and costs. Respondents have affected interstate commerce.

This case presents several important legal issues warranting the Court's review involving the economic value and enforcement of United States Copyright (17 U.S.C.) and intellectual property rights involving individual State governments and their officials.

Mihalek is a competent, credible and professional small businessperson (see Sixth Circuit Appendix,

hereinafter called "Appendix", pages 940 through 960 and page 996, 1013, 1016, 1024 and 1030).

Mihalek created an advertising program starting in the fall of 1980 (see Appendix, pages 37 through 46 and pages 351 through 420).

Mihalek's advertising program property consisted of expressions, business ideas, slogans, promotional schemes, campaigns and the like. Mihalek's property was unpublished.

Mihalek presented his advertising program property in tangible form to Respondents in a confidential manner with written notice of property rights. (See affidavit of Mihalek, attached hereto marked attachment I.)

The advertising program created by Mihalek was prepared at the behest of the Governor of the State of Michigan and numerous members of his administration. (See paragraphs 7 and 8 of attachment I.)

Over a period of 14 months Mihalek prepared his advertising program. (See Appendix pages 357 through 360). Mihalek spent approximately 3,500 personal

man-hours, 122 trips to the State Capitol, hundreds of telephone calls through the State of Michigan gathering information and support, and personal out-of-pocket expenses of $74,231.00 in the development of his property. (See Appendix page 472.) During this period of time, unbeknownst to Mihalek, many of the same Respondents' officers and employees were meeting simultaneously with representatives of another firm, Porter Novelli & Associates, that was attempting to obtain a contract from the Respondents for the same purposes as Mihalek's Advertising Property (see Appendix page 324).

The executed contract with Porter Novelli & Associates had a performance period from July 13, 1981 through September 30, 1982, to create an advertising program similar in many respects to Mihalek's Advertising Property. The performance period was approximately fourteen months. The same state officials, e.g., Jack S. Wilson, who had access to Mihalek's Advertising Property dealt directly with Porter

Novelli & Associates. (See paragraphs 14 through 18 of Attachment I.) Porter Novelli & Associates created its advertising program in thirteen days after executing a contract with a performance period of fourteen months. (See Appendix pages 326 and 328.)

During an investigation conducted by the Earegood Private Detective Agency on behalf of Mihalek, two unauthorized photocopies of Mihalek's property, copyright registration number TXu-139-833, were supplied by the Respondents from the certified file of Respondents' officials who were responsible for the development of the Respondents' advertising campaign. These officials were the above Jack J. Wilson, Director of the Michigan Travel Bureau, and Norton L. Berman, Director of the Michigan Department of Commerce. This identical copying was neither authorized nor known by Mihalek (see Appendix page 280). The unauthorized copies were stamped **"THIS DOCUMENT PAID FOR WITH STATE FUNDS."** No payment was ever made to Mihalek. A detailed review of the circumstances involved in the taking and using of

Mihalek's property are explained on pages 316 through 328 of the Appendix.

Similarities between Mihalek's advertising property and Respondents' advertising program were established by exhibits presented to the Courts below (see Appendix page 757). Similarities between these two programs were also established by live testimony of a Respondents' official (see Appendix page 563). In addition, similarities between these programs were also established by nine affidavits presented to the Courts below (see Appendix pages 106-129).

In September of 1981, Mihalek became aware that the respondents had contracted with another firm and were using Mihalek's advertising property. Mihalek retained legal counsel who contacted State officials. Mihalek was advised to write a letter to the Governor of the State of Michigan, dated September 28, 1981. By letter, dated September 29, 1981, the Governor of the State of Michigan instructed Mihalek to continue, ". . .It is important, therefore, that you keep them fully

informed of your efforts. . ." (see attachment I). The very quick reply by the Governor indicates the importance of Mihalek's work to the Governor and the continuing need for his advertising program.

Mihalek was verbally promised a contract by high ranking State officials as soon as the Department of Commerce received monies from the Michigan legislature. State officials at high levels from the Governor's office, Lieutenant Governor's office and the Michigan Department of Commerce continued to have access to Mihalek's property and continued to visit Mihalek's office in his home. (See attachment I.)

In March of 1982, Norton L. Berman, Director of the Michigan Department of Commerce, called Mihalek, "some kind of kook". This is at the same time that Berman's staff was requesting additional proposals from Mihalek. Mihalek continued to work with the Governor's office and was unaware of Berman's statement.

In April of 1982, when the Michigan Department of Commerce received the appropriation for their

advertising program, Mihalek did not receive a contract as promised.

Mihalek then, in June of 1982, petitioned the Michigan Legislature to investigate the actions of the Executive branch of Michigan State Government. The response from the Michigan House of Representatives was in part:

> . . While the "Say Yes" campaign does contain some elements similar to those suggested in your materials, those seem to me to be ones any competent professional in the field would consider. . . and your best course of action for the personal remedies you seek is private legal action. . . (Appendix page 1066).

Mihalek then petitioned the Governor of the State of Michigan to investigate and redress his grievances (Appendix page 1069). The Governor's response was silence.

On August 12, 1982, Mihalek filed a suit in the Circuit Court for the County of Ingham, State of Michigan, against the Governor of the State of Michigan for failing to uphold Mihalek's constitutional rights. File Number 82-30168-AW. The Circuit Judge granted an

order to show cause why the Governor failed to honor his sworn Constitutional Obligations, as described in the Complaint. (Appendix pages 1075-1081.) The Ingham County Circuit Judge ruled he could not order the Governor to start an investigation because it would violate the separation of powers between the state judicial and executive branches of government.

On October 21, 1982, Mihalek filed notices of intention to file claims against the State of Michigan and State Officials for breach of contract, civil conspiracy, misappropriation of work product and breach of confidentiality in confidential fiduciary relationships. These notices were filed in accordance with state statutory requirements.

On October 27, 1982, Mihalek filed a defamation of character suit against the State of Michigan and Norton L. Berman for calling Mihalek, "some kind of kook", which was stated wrongfully and with malice. File number 82-8479. Thereafter, the suit was dismissed based on State immunity.

The State of Michigan entered into settlement negotiation with Mihalek in November of 1982. In March of 1983, after the January inauguration of a new Governor, the State of Michigan suddenly and unexpectedly reversed from settlement negotiation to a refusal to negotiate. Mihalek was then forced to seek financial relief from the Michigan Department of Social Services.

In March of 1983, undersigned copyright counsel was retained to protect Mihalek's property rights. An investigation of state files (approximately 25,000 documents) was conducted from June 1983 through April 1984, by The Heikkenen Law Firm, P.C. and The Earegood Private Detective Agency, on behalf of Mihalek. The documents from the State's files support Mihalek's claims.

On January 19, 1984, the Governor of the State of Michigan was notified by letter that respondents had infringed Mihalek's advertising property. On January 27, 1984, Assistant Attorney General Philip J. Smith

requested further information. Attorney Smith was advised to contact Assistant Attorney General Robert Ianni, who had previously negotiated with Mihalek in an attempt to resolve the issues prior to the January inauguration of Governor James J. Blanchard.

Having received no further reply, Mihalek then notified numerous State officials, officers and vendors that they were infringing Mihalek's property rights. Having notified all known infringers or potential infringers, Mihalek wrote Governor James J. Blanchard of the action taken, and requested negotiations with a view towards settling the issues and avoiding litigation on April 3, 1984.

The only response by the respondents to the April 3, 1984 letter was a suit sounding in copyright, filed April 12, 1984 in the Livingston County Circuit Court of the State of Michigan, File Number 84-7310-CK, to obtain a temporary restraining order, a permanent injunction, and a retraction letter against further notices being sent by Mihalek, and requesting a declaratory judgment that

respondents have not violated Mihalek's copyrights (Appendix pages 1483-1538). This Court, of course, had no jurisdiction whatsoever (see 28 U.S.C. §1338a).

On April 23, 1984, Mihalek filed in the United States District Court, Eastern District of Michigan, Southern Division, File Number 84-CV-7202-AA, a verified complaint (Appendix pages 24-46). A petition for removal of suit, File Number 84-CV7203-AA was filed concurrently with Mihalek's complaint (Appendix pages 1555-1563). The Petition for removal was granted by the District Court.

In May of 1984, respondents moved for dismissal of Mihalek's complaint, based on the 11th Amendment to the United States Constitution (see documents involving appeals number 84-1851 and 84-1854).

On October 12, 1984, the District Court in view of the Eleventh Amendment dismissed the State of Michigan and the Michigan Department of Commerce completely and reduced the claims to petitions for injunctive relief against individual State officers only.

On October 25, 1984, the District Court entered an order for judgment on multiple claims and involving mutliple parties under Rule 54(b) Rules of Civil Procedure and an order amending memorandum and order of the court, dated October 12, 1984, to include the statement prescribed by 28 U.S.C. section 1292(b) involving the 11th Amendment (Appendix pages 1666-1672). Mihalek appealed to the Sixth Circuit Court of Appeals solely on the basis of the 11th Amendment (see appeal file numbers 84-1851 and 84-1854). The case proceeded for injunctive relief only against State officials.

On November 15, 1984, Mihalek filed a verified amended complaint (Appendix pages 47-70). The Respondents moved on January 14, 1985 to dismiss Mihalek's amended complaint (Appendix pages 1197-1214). Mihalek responded (Appendix pages 1215-1235).

On February 11, 1985, Respondents moved for summary judgment on Mihalek's copyright claims for injunctive relief only (Appendix pages 172-186). Mihalek

responded (Appendix pages 271-533). It is interesting to note that the District Court would not schedule Mihalek's motion for injunctive relief as described on pages 271-533.

On February 21, 1985, an informal hearing was held in the District Court on the record (Appendix pages 187-268). The District Court Judge stated in part:

> **. . .I have your proof of what you say . . . You tell me — the showing that you have made to me this afternoon are certain people have done substantial things. . . (Appendix page 257)**

In addition, the District Court suggested that the Respondents settle with Mihalek (Appendix page 255).

On February 22, 1985, the District Court enjoined Mihalek from serving Mihalek's amended complaint on the party defendants, except for Ross Roy, Inc. (Appendix pages 1265-1267).

On March 26, 1985, the District Court ordered Mihalek to match Respondents' exhibits (Appendix pages 269-270). There was no motion for or hearing on this

order by any party to the suit. Respondents' exhibits were subsequently selected to show dissimilarity.

On April 17, 1985, the District Court, by way of oral opinion, granted the Respondents' motion for summary judgment on Mihalek's copyright claims (Appendix pages 534-591). The order was entered on April 24, 1984 (Appendix page 592).

On May 6, 1985, Mihalek filed a timely motion for reconsideration and rehearing of the order granting Respondents' motion for summary judgment dismissing copyright claims (Appendix pages 593-611). On June 5, 1985, the District Court denied Mihalek's motion (Appendix pages 611-627). Mihalek appealed to the Sixth Circuit Court of Appeals. Appeal was granted (see Appeal file number 85-1593).

On April 30, 1985, Respondents moved for summary judgment on Mihalek's remaining claims (Appendix pages 630-646 and 701-709). Mihalek responded (Appendix pages 647-692). In addition, Ross Roy, Inc. moved for summary judgment (Appendix pages 693-700).

On September 24, 1985, the District Court, by way of oral opinion, granted Respondents' motions for summary judgment (Appendix pages 710-749). Final order was entered on November 6, 1985 (Appendix pages 750-753). Mihalek appealed. Appeal was granted (see appeal documents 85-1986).

On March 18, 1987, the Sixth Circuit Court of Appeals affirmed the District Court's judgment reported at 814 F2d 290 (6th Cir. 1987).

On March 30, 1987, Mihalek filed a petition for rehearing involving two of the appeals (see 85-1593 and 85-1986) that the Court of Appeals neglected to reach (attachment B).

On June 8, 1987, the Court of Appeals denied Mihalek's petition for rehearing and remanded back to the District Court a question of fact involving copyright infringement and failed to reach the 11th Amendment.

Mihalek now files this Writ of Certiorari to this Honorable Court.

REASONS FOR GRANTING THE PETITION

This case presents several important legal issues warranting the Court's review involving the economic value and enforcement of United States Copyright (17 U.S.C.) involving individual State governments and their officials.

For example, first:

The District Court dismissed the complaint as to the State of Michigan and the Michigan Department of Commerce on the grounds of the Eleventh Amendment (United States Constitution) immunity and held that state officials are not liable for money damages, (595 F. Supp. 903). The District Court's order was certified pursuant to 28 U.S.C. section 1292(b) and a judgment was entered pursuant to Rule 54(b), F.R.C.P. There is a conflict in the circuits on this issue. Compare Mills Music, Inc. v Arizona, 591 F2d 1278 (9th Cir. 1979), and Johnson v University of Virginia, 606 F. Supp. 321 (W.D. Va. 1985), with Wihtol v Crow, 309 F2d 777 (8th Cir. 1962), Cardinal

Industries v Raymond C. King and Michael H. Patterson, Supreme Court Docket No. 86-1941, Richard Anderson Photography v Radford University, 633 F. Supp. 1154 (W.D. Va. 1986), Woelffer v Happy States of America, Inc., 636 F. Supp. 499 (N.D. Ill. 1985), Mihalek Corp. v Michigan, 595 F. Supp. 903 (E.D. Mich. 1984), and B.V. Engineering v University of California, Los Angeles, 657 F. Supp. 1246 (C.D. Cal. 1987). See generally Note, The Applicability of Eleventh Amendment Immunity Under The Copyright Acts of 1909 and 1976, 36 Am. Univ. L. Rev. 163 (1986), Copyright Infringement and The Eleventh Amendment: A Doctrine of Unfair Use?, Vanderbilt L. Rev. Vol. 40:225, page 226 (1987), Congressional Abrogation of State Sovereign Immunity, Columbia L. Rev., Volume 86, No. 7, page 1436, November 1986; The Eleventh Amendment: A License To Steal? Idea - The Journal of Law and Technology, to be published in 1987.

Virtually all creative properties protectable by copyright are affected and the issue spills over into the

patent arena as well. In the recent series of cases, architectural plans, photographs, computer programs and complete promotional campaigns have been taken by infringement. State governments and persons in their employ have been dismissed from the suits, the courts ruling that sovereign immunity under the XI Amendment to the United States Constitution prevents damage actions in Federal Court for copyright infringement. Since jurisdiction is exclusive in the Federal Courts, copyright owners have no other recourse for damages. In some suits, injunctive relief has also been denied.

To date, decisions adverse to copyright owners have recently been rendered in Michigan, Illinois, Virginia, Florida and California. Immunity extends to state universities, schools, libraries and local governments - in short, any instrumentalities created and empowered under state constitutions. Protected by the sovereign immunity defense, such organizations can take any copyright protected works with impunity. Without fear of damages, the only threat is possible injunctive relief,

which in many takings is too late to prevent the damage caused by the taking.

The following Amici Curiae filed briefs in the Sixth Circuit in support of Mihalek's position (see appeal number 84-1851/1854):

Association of American Publishers

American Intellectual Property Law Association

American Medical Publishers Association

American Society of Composers, Authors and Publishers

Authors League of America

Broadcast Music, Ltd.

Films, Incorporated

Music Publishers Association of the United States

National Music Publishers' Association

Swank Motion Pictures, Inc.

Volunteer Lawyers for the Arts

According to a report entitled, "The Copyright Industries in the United States; An Economic Report

Prepared For the American Copyright Council," by Michael R. Rubin, American Copyright Council, Inc., 1985, on page one:

> In 1982 final demand expenditures for products of the copyright industries came to $140.9 billion, or about 4.6 percent of Gross National Product. In addition, some $11.3 billion was spent on semiconductors in the United States in 1982. . . It is interesting to note that most of the copyright industries grew at a faster rate than the 16.6 percent increase recorded over that time by the economy as a whole. . ."

Concomitant with the first example are:

Second:

Are intellectual property rights considered a property under the Fifth Amendment taking clause?

And, third:

What are the standards of the tests of copyright infringement, the taking of intellectual property under the Fifth Amendment and false designation of origin, section 43(a) of 15 U.S.C. 1125(a)?

Given the recent apparent errors by most of the courts below resulting in confusion and split between the Federal circuits and the importance of the economic

value and enforceability of intellectual property rights, further review by this Court is therefore warranted to assure that the exclusive rights granted by the United States Constitution (Art. I, Sec. 8, Cl. 8) and the Copyright Act as well as the rights granted under the Fifth Amendment and the Lanham Act are not effectively destroyed by the above recent spate of lower court decisions.

THE COURT OF APPEALS ERRED IN NOT REACHING THE ELEVENTH AMENDMENT

The Court of Appeals erred in not reaching the Eleventh Amendment issue for two reasons:

First, the District Court dismissed all of the claims against the State of Michigan and the Michigan Department of Commerce not on the merits, but solely on the ground that the District Court lacked jurisdiction under the Eleventh Amendment. For that reason, the Court of Appeals did not have jurisdiction to adjudicate Mihalek's claims against the State of Michigan and

Michigan Department of Commerce on any other ground, notwithstanding the consolidation of all the appeals.

The Order appealed from, entered on October 25, 1984, directed that final judgment be separately entered on all claims against the State of Michigan and Michigan Department of Commerce, pursuant to Rule 54(b) which stated:

> **Judgment on Multiple Claims and Involving Multiple Parties under Rule 54(b) Rules of Civil Procedure**
>
> This court having entered a memorandum opinion and order dated October 12, 1984 in this matter, which order contained the following findings, determinations and directions:
>
> > This court holds that all defendants in this action are entitled to immunity under the eleventh amendment from plaintiff's prayer for money damages under each of his four theories of liability. Further, the recent decision of Pennhurst State School v Halderman, 104 S.Ct. 900 (1984), makes clear that the eleventh amendment also prohibits federal courts from awarding injunctive relief against state officials for claims predicated upon state law. Insofar as plaintiff's claim for disclosure of trade secrets, unfair

> competition, and misappropriation of word product is grounded upon state statutory or common law, that claim can not support an action for injunctive relief against these defendants under the reasoning of Pennhurst. To the extent that plaintiff is seeking injunctive relief against future violations of his federally protected rights by the individual defendants, the eleventh amendment offers no protection to the individual defendants, Ex Parte Young, supra. The State itself, and the Department of Treasury, are immune from suit altogether, however, Hans v. Louisiana, 134 U.S. 1 (1890), Employees v. Department of Public Health and Welfare, 411 U.S. 279 (1973).

> Now, therefore, express direction is given as to the entry of judgment and it is adjudged that the final judgment should be and is hereby entered against the plaintiffs and in favor of the defendants as to the separate claims and parties pursuant to the findings, determinations and directions quoted above, there being no just reason for delay.

The subsequent filing of the appeal numbers 84-1851/84-1854 transferred to the Court of Appeals exclusive jurisdiction over those claims, and left pending before the District Court only Mihalek's claims for

injunctive relief against the individual Respondents and not the State of Michigan and the Michigan Department of Commerce. The District Court's orders granting summary judgment for the Respondents on the merits only disposed of injunctive claims against individual defendants.

The Eleventh Amendment was not merely an alternate ground for dismissal of the claims against the State of Michigan and the Michigan Department of Commerce. Rather, since the District Court never adjudicated the claims against the State of Michigan and the Michigan Department of Commerce, but held that it lacked jurisdiction to do so, the Court of Appeals may not adjudicate the merits either, unless it first reverses the holding of Eleventh Amendment issue, which was the only issue properly before the Court of Appeals on that instant appeal (84-1851/84-1854). Therefore, the Court of Appeals erred in not reaching the Eleventh Amendment involving the State of Michigan and the Michigan Department of Commerce.

Second, the Court of Appeals erred as a matter of law in not reaching the Eleventh Amendment. The Court of Appeals determined there are material issues of fact in this case, as exhibited by the remand of the question of fact involving the direct photocopying by the respondents of two advertising program plan documents owned by Mihalek in violation of Mihalek's explicit written instructions and copyright notices on the program plan documents. By definition the copies of copyright registration number TXu-139-833 are not only substantially similar, they are identical. The Eleventh Amendment issue must first be reached to determine liability in the respondents, as a matter of law before determination of infringement.

THE DISTRICT COURT ERRED IN HOLDING THAT STATES AND THEIR POLITICAL SUB-DIVISION THEREOF ARE IMMUNE FROM SUIT FOR COPYRIGHT INFRINGEMENT BY THE ELEVENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

Historically, this issue was addressed by the Sixth Circuit Court of Appeals in Howell v. Miller et al., 91 F. 129 (1898) wherein the Court stated on page 136:

> . . ."A state cannot authorize its agents to violate a citizen's right of property, and then invoke the constitution of the United States to protect those agents against suit instituted by the owner for the protection of his rights against injury by such agents". . .

and on page 137:

> . . ."It would be extraordinary if a court of equity could not stay the hands of the defendants, if what they are about to do will be in violation of the plaintiff's rights as secured by the laws of the United States". . .

More recently Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962) held without discussion that the Eleventh Amendment barred an action against a local school district, as an instrumentality of the state, for copyright infringement.

The definitive cases for analysis of the issue, however, appear to be Mills Music, Inc. v. State of Arizona, 591 F.2d 1278 (1979) and Goldstein v. California, 412 U.S. 546, 93 S. Ct. 2303, 38 L. Ed. 2d 163 (1973). The Eleventh Amendment states as follows:

> "The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

The Mills Court goes on to analyze the language of the act commenting as follows:

> "The language of the statute is sweeping and without apparent limitation, suggesting that Congress intended to include states within the class of defendants... Even the United States is liable for the infringement of a copyright, 28 USC §1498(b); to hold that Congress did not intend to include states within the class of defendants would lead to an anomalous construction of the statute at best... Here, Congress has acted pursuant to the Copyright and Patent Clause to regulate the commercial disposition of a certain property right... The Copyright and Patent Clause is a specific grant of constitutional power that contains inherent limitations on state sovereignty... We conclude that the sweeping language used by Congress, acting pursuant to the Copyright and Patent Clause, is sufficient indication of the intent to include states within the class of defendants." 591 F.2d at 1285.

The Mills Court goes on in support of its conclusion:

> "...it is clear that the abrogation of a state's Eleventh Amendment immunity is inherent in the Copyright and Patent Clause and the Copyright Act."

and goes on to quote the Copyright and Patent Clause of the United States Constitution, Art. I, §8, cl. 8, as specifically empowering Congress to secure to Authors

and Inventors their exclusive rights to their Writings and Discoveries.

To follow the opposing sovereign immunity argument to its logical conclusion would be to grant that states have a royalty free license to copy without limitation any authors' works and to make, use or sell any invention freely without restriction of any kind unless the state in its wisdom consents to suit. Such an outcome completely contradicts the obvious intent of the framers, of both the United States Constitution and the Michigan State Constitution wherein the Fifth Amendment of the former:

> "No person shall. . .be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

and Article 1, §17 of the latter:

> "No person shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law.. . ."

specifically provide for due process of law and just compensation in the taking of private property for public purposes.

The Mills Court stated:

> ". . .a state may not, consistent with the Constitution, infringe the Federally protected rights of the copyright holder and thereafter avoid the federal system of statutory protections. The 'Exclusive Rights' of an author, guaranteed under the Constitution and Copyright Act, would surely be illusory were a state permitted to appropriate with impunity the rights of [the] lawful copyright holder." 591 F.2d at 1286.

The Mills Court concluded:

> "that the Eleventh Amendment's sovereign immunity does not permit a state to nullify the rights reserved and protected by Congress, acting pursuant to the Copyright and Patent Clause." 591 F.2d at 1286.

In Goldstein v. California, 412 U.S. 546, 93 S. Ct. 2303, 38 L. Ed. 2d 163 (1973), the issue was federal pre-emption of the copyright field. The Supreme Court noted:

> ". . .the States cannot exercise a sovereign power which, under the Constitution, they have relinquished to the Federal Government for its exclusive exercise." 412 U.S. at 552. (Emphasis added.)

Congress, in enacting 28 U.S.C. §1338(a) made jurisdiction in copyright and patent cases "exclusive of the courts of the states."

> "The district courts shall have original jurisdiction of any civil action arising under any Act of Congress relating to patents, plant variety protection, copyrights and trademarks. Such jurisdiction shall be exclusive of the courts of the states in patent, plant variety protection and copyright cases." 28 U.S.C. §1338(a).

In joining the Union, the State of Michigan clearly ceded to Congress the power to regulate under the patent and copyright clause and necessarily granted to Congress the power to enact legislation restricting the State's power in the field of patent and copyright law. In keeping with the Constitutional mandate that authors and inventors have the exclusive right to their respective writings and discoveries, Congress has enacted legislation granting exclusive rights to be reserved and protected by the Federal Judiciary, e.g., 28 U.S.C. §1338, 17 U.S.C. §301.

The plain language of these Federal Statutes granting exclusivity under Federal Law and exclusive

jurisdiction to the Federal Courts makes clear Congress' intent to abrogate the State of Michigan's and all other state's Eleventh Amendment Immunity defenses to claims arising out of patent and copyright causes. In a case arising out of the Federal Extradition Act, the Court stated:

> "A state's Eleventh Amendment immunity,. . ., is not absolute but subject to abrogation by Congress in its exercise of powers delegated to it by the states in the Constitution." County of Monroe v. State of Florida, 678 F.2d 1124, 1131.

The Goldstein and Mills cases relied upon above concerned causes of action arising under the previous Copyright Act enacted in 1909; however, the arguments enunciated by Mihalek above and the quotations from the cases are not only applicable under the present Copyright Act, Public Law 94-553, October 19, 1976, but given further strength by 17 U.S.C. §301(a), the Federal Pre-emption Clause of the present Copyright Act. Congress, in enacting §301(a), clearly expressed its intent that all rights falling within the rights enumerated in the Act shall be exclusively governed by Federal Law:

> "On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103, whether created before or after that date and whether published or unpublished, are governed exclusively by this title. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law or statutes of any State." 17 U.S.C. §301(a).

Suit for copyright infringement against a state is clearly within the exclusive jurisdiction of the United States Courts and is not barred by the Eleventh Amendment to the United States Constitution.

By clear and obvious analogy there is no way for a copyright owner to enforce his rights against a state but by means of action in Federal Court. Clearly such action includes both the injunctive and monetary relief specified by Congress in enacting the series of copyright and patent laws beginning with the first federal patent and copyright law, 1 Stat. 109 (1790) to today, see 35 U.S.C. §1 et seq. and 17 U.S.C. §101 et seq. These laws, like

other laws of the United States enacted pursuant to constitutional authority, are the supreme law of the land. See Sperry v. Florida, 373 U.S. 379 (1963). In Sperry the Supreme Court ruled that the Patent Office power to regulate the practice of patent agents before the Patent Office was exclusive to the Patent Office and that the State Bar Association of Florida and State of Florida had no power to prohibit a non-member patent agent from practicing before and representing clients before the Patent Office.

The intent of Congress that the Copyright Act 17 U.S.C. §101 et seq. be exclusively within the realm of Federal jurisdiction and apply to states as well as lesser governmental and public bodies is clear from a reading of many sections of the Act.

In Goldstein, supra, the Supreme Court stated with respect to the previous Copyright Act enacted in 1909:

> "When Congress grants an exclusive right or monopoly, its effects are pervasive; no citizen or State may escape its reach." 412 U.S. at 560, 93 S. Ct. at 2312. (Emphasis supplied.)

Not only did Congress make itself clear that State statutes were pre-empted under §301(a) of the present Copyright Act as noted above but in §108 Congress enacted a lengthy and complicated set of provisions governing the relationship of libraries and archives with respect to permissible and impermissible copying of protected works. Finally, in the last paragraph thereof, §108(i), Congress provided for reports at five-year intervals to Congress analyzing the operation of these complicated provisions and making recommendations for improvement, 17 U.S.C. 108(a)-(i). Such legislation would have been almost totally superfluous if public libraries were intended to be exempt from penalties for infringement of copyrighted works.

As a second example, §118 of the Copyright Act refers to the use of certain works in connection with noncommercial broadcasting. Section 118 defines in a lengthy complicated series of provisions the relationship between the use of certain types of copyrighted works for broadcasting by "public broadcasting entities" and in the

final paragraph §118(g) defined a public broadcasting entity as follows:

> "(g) As used in this section, the term 'public broadcasting entity' means a noncommercial educational broadcast station as defined in section 397 of title 47 and any nonprofit institution or organization engaged in the activities described in clause (2) of subsection (d)." 17 U.S.C. §118(g). (Emphasis supplied.)

These provisions too would be superfluous if all the many public television and public radio stations owned by publicly supported entities such as state universities were immune from penalties for copyright infringement. Clearly, Congress provided for payment of royalties for the broadcast of copyrighted works in accordance with rules established by the Copyright Royalty Tribunal (see e.g., 17 U.S.C. §118(b), (c) and (d)). Here again provision was made for a report to Congress on problems and recommendations for future legislation with respect to the section, 17 U.S.C. §118(e)(2).

Further examples of the clear intent of Congress not to exclude the states and their instrumentalities are provided by §601(b)(3) as follows:

> "(3) where importation is sought under the authority or for the use, other than in schools, of the Government of the United States or of any State or political subdivision of a State;" 17 U.S.C. §601(b)(3). (Emphasis supplied.)

wherein an exemption is provided for importation by States or their political subdivisions of nondramatic literary material not manufactured in the United States or Canada. Note that Congress excepts schools from the exemption. Clearly only where Congress intends a State be exempt is an exemption provided. And in the following section covering the importation of infringing copies of other works:

> "(1) importation of copies or phonorecords under the authority or for the use of the Government of the United States or of any State or political subdivision of a State, but not including copies or phonorecords for use in schools, or copies of any audiovisual work imported for purposes other than archival use;" 17 U.S.C. §602(a)(1).

wherein the States and political subdivisions are excluded from penalties for importation of infringing works but the schools and audiovisual works are further excepted from the exclusion.

Clearly the exemptions and exceptions carefully carved out by Congress would not be necessary if Congress did not clearly intend the States and their political subdivisions be subject to the Copyright Act.

THE DISTRICT COURT ERRED IN HOLDING THAT INDIVIDUAL OFFICERS, OFFICIALS, EMPLOYEES AND AGENTS OF A STATE ARE IMMUNE FROM SUIT FOR DAMAGES FOR COPYRIGHT INFRINGEMENT BY REASON OF THE ELEVENTH AMENDMENT

Immunity in such individuals from suit for damages for copyright infringement can arise only from a protection in turn derived from the combination of immunity derived from the State and actions by the individuals not beyond their authority in their official capacities. Without State immunity under the Eleventh Amendment, the individuals, by violating the provisions of the Copyright Act 17 U.S.C. §101 et seq. and therefore violating Federal statutory provisions are acting beyond the scope of authority granted by their respective offices, see Capitol Industries-EMI, Inc. v Bennett, 681 F.2d 1107 (1982).

The Courts, however,have considered transactions wherein Eleventh Amendment immunity has protected the State instrumentality. In Louisiana State Board of Education v. Baker, 339 F.2d 911 (1964), the Court citing a 1911 Supreme Court decision stated on pages 913 and 914:

> "The Supreme Court clearly stated the controlling principle in Hopkins v. Clemson Agricultural College, 1911, 221 U.S. 636, 31 S. Ct. 654, 55 L. Ed. 890. Clemson, a State College, had built a dyke across the river from the plaintiff's land causing his land to be flooded. The plaintiff sued the college for taking his property without due process of law. The court held that the action was not one against the State. Mr. Justice Lamar, for a unanimous court, said:
>
> > 'But immunity from suit is a high attribute of sovereignty,—a prerogative of the state itself,—which cannot be availed of by public agents when sued for their own torts. The 11th Amendment was not intended to afford them freedom from liability in any case where, under color of their office, they have injured one of the state's citizens. To grant them such immunity would be to create a privileged class, free from liability for wrongs inflicted or injuries threatened. Public agents must be liable to the law, unless they are to

> be put above the law * * *. Commissions have been enjoined from enforcing confiscatory rates. * * * Commissions have been restrained from enforcing a statute which illegally burdened interstate commerce. * * * Other cases might be cited which deny public boards, agents, and officers immunity from suit [cited cases omitted]'. 221 U.S. 641, 644, 645, 31 S. Ct. 654, 656.

Thus, a state official cannot proceed, upon assumption of state power to injure the state's citizens under color of their office and then avoid responsibility by hiding behind a cloak of Eleventh Amendment immunity. The copying of Mihalek's works has been no less damaging to the property of Mihalek than the permanent flooding of real estate. Reiterating the statement above from Howell v. Miller, 91 F.129 (1898) at 136:

> . . ."A state cannot authorize its agents to violate a citizens right of property, and then invoke the Constitution of the United States to protect those agents against suit instituted by the owner for the protection of his rights against injury by such agents". . .

To cloak the agents of the State of Michigan with immunity is to put them above the copyright law of the United States and grant them a special privilege to copy with impunity and without fear of suit for damages. To proscribe suit for damages against individuals as agents of the State is to remove the overwhelmingly most important penalty for copyright infringement. Injunctive relief provides no compensation for past damages. It is truly easier to "open the dyke and reclaim the land" than it is to recall infringing works once published and distributed. To permit such individuals as agents to copy without fear of damages is to create a special class of individuals with the power to take private property without due process of law or just compensation at the sole discretion of such individuals as agents of the State and without any control over the taking. Mihalek does not believe that such was the intent of the framers of the Eleventh Amendment or Congress in enacting the present Copyright Act 17 U.S.C. §101 et seq. or the previous acts.

THE DISTRICT COURT ERRED IN HOLDING THAT VIOLATION OF TRADE SECRETS, UNFAIR COMPETITION AND MISAPPROPRIATION OF WORK PRODUCT IN SO FAR AS THEY ARE GROUNDED UPON STATE STATUTORY OR COMMON LAW ARE BARRED FROM SUIT IN FEDERAL COURT AGAINST THE STATE OR STATE OFFICERS BY THE ELEVENTH AMENDMENT DESPITE ANCILLARY CONNECTION TO A NON-BARRED CLAIM FOR INJUNCTION AGAINST THE SAME OFFICERS

The District Court relies upon Pennhurst v. Halderman, 104 S. Ct. 900 (1984) in ruling that the Eleventh Amendment prohibits federal courts from awarding injunctive relief against State officials for claims predicated upon state law. However, in Pennhurst the Supreme Court carefully distinguished between actions on the part of State officers within the scope of their delegated powers and actions beyond the scope of their delegated powers, see e.g., Footnote 11 in Pennhurst.

The instant case may be clearly distinguished from Pennhurst. Trade secrets, misappropriation of work product and unfair competition causes are private property rights or arise therefrom. International News

Service v. Associated Press, 148 U.S. 215, 240; 63 L. Ed. 211, 39 S. Ct. 68 (1918). Amchem Products, Inc. v Costle, 481 F. Supp. 195 (1979).

State officials are clearly without discretionary authority to take, confiscate or destroy property at will. Only with due process of law and just compensation in accordance with the Fifth and Fourteenth Amendments to the United States Constitution and Article 1, §17 of the Michigan State Constitution (supra) can private property be taken for public use. Authority delegated to the State officers, if any, is limited by these constitutional provisions.

In the instant case, the allegations are of a taking in violation of the above constitutional proscriptions and therefore upon a complete and total lack of delegated power in the States' officers. Any taking by State's officers is beyond the authority of the State to delegate. Thus, the instant case comes cleary within the ambit of Florida Dept. of State v. Treasure Salvors Inc., 458 U.S. 670 (1982) and Larson v. Domestic & Foreign

Commerce Corp., 337 U.S. 682 (1949), wherein the taking by State officials was beyond the authority delegated to the officials and not within their discretionary authority.

THE COURT OF APPEALS ERRED IN AFFIRMING THE SUMMARY JUDGMENT ON THE COPYRIGHT CLAIM

There is a material issue of fact, as matter of law, as already noted by the Court of Appeals, in the remand of the direct copying of copyright registration number TXu-139-833, in their Order, dated June 8, 1987, denying Mihalek's petition for rehearing. The photocopying by the Respondents in violation of Mihalek's explicit written instructions constitutes copyright infringement as a matter of law. By definition the copies are not only substantially similar, they are identical. A question of fact is present, thereby making summary judgment impossible.

The direct copying of copyright registration number TXu-139-833 was presented to the District Court six times during briefing and oral argument. In addition, the

direct copying issue was presented eight times during briefing and oral argument to the Court of Appeals. The courts below simply attempted to duck the issue until the Court of Appeals was forced to make the above decision on remand.

The numerous affidavits of "average lay observers": Alice T. Thebo, a notary public and Livingston County Deputy Circuit Court Clerk, Louis F. Glubzinski, an advertising manager for a Michigan newspaper, Edward Ruzumna, a store owner, Leejeen W. Sobotta, a Livingston County Deputy County Clerk, James E. Alexander, a service station manager, Darlene F. Balderas, a secretary administrator, Dennis D. Pushies, a journeyman electrician, Robert R. Daniels, Sr., a notary public and retired fire-engineer and the letter of Dennis J. Deshaies, dated March 28, 1985, witnessed by Sister Rita Martin, all show substantial similarity sufficient to defeat a Summary Judgment Motion.

The affidavits above by "average lay observers" show clearly "substantial similarity". To rule otherwise

as the Courts below have done is to show clearly a genuine issue of material fact as a matter of law. When there is the slightest doubt as to the facts, the courts have held that summary judgment may not be granted. See, First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-90, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968); Veal v. Lindsay, 468 F.2d 287, 291 (2 Cir. 1972); Janis v. Wilson, 385 F. Supp. 1143, 1147 (D.S.D. 1974); Keller v. California Liquid Gas Corp., 363 F. Supp. 123, 126 (D. Wyo. 1973).

Pursuant to FRCP 56(c), Mihalek has by his pleadings, exhibits, affidavits and the admissions of the Respondents established that there is a genuine issue of material fact as to substantial similarity.

This court in Poller v. Columbia Broadcasting System, Inc., 82 S. Ct. 486; 368 U.S. 464, 7 L. Ed. 2d 458 (1962) stated:

> . . ."Summary judgment should be entered only when pleadings, depositions, affidavits and admissions filed in a case show no genuine issue as to any material fact." Fed. Rules Civ. Proc. rule 56(c), 28 U.S.C.A.

and in Simler v. Conner, 83 S. Ct. 609, 372 U.S. 221, 9 L. Ed. 2d 691 (1963) stated:

> . . ."Summary judgment was not warranted in view of conflicting facts presented by affidavits and depositions to district court. Fed. Rules Civ. Proc. rule 56, 28 U.S.C.A."

clearly showing that summary judgment against Mihalek should not have been entered in favor of the Respondents.

The District Court misled Mihalek by the Order of the Court, dated March 26, 1985, ordering Mihalek to match the Respondents' exhibit B in which the Respondents used an extrinsic test listing dissimilarities to determine whether the expressions in the Respondents' campaign are substantially similar to the expressions used by Mihalek. The extrinsic test is inappropriate; an intrinsic test must be used. As the court stated in Arnstein v. Porter, 154 F.2d 464, 468-69 (2 Cir. 1946), cert. denied, 330 U.S. 851, 67 S. Ct. 1096, 91 L. Ed. 1294 (1947):

> "Whether (if he copied) defendant unlawfully appropriated presents, too, an issue of fact. The proper criterion on that issue is not an analytic or other comparison of the respective. . .compositions. . ..The plaintiff's

> legally protected interest in the potential financial return from his compositions which derive from the lay public's approbation of his efforts. The question, therefore, is whether defendant took from plaintiff's works so much of what is pleasing to the [eyes and] ears of lay [persons], who comprise the audience for whom such popular [works are] composed that defendant wrongfully appropriated something which belongs to the plaintiff. Surely, then, we have an issue of fact which a jury is peculiarly fitted to determine." 154 F.2d at 472-73 (footnotes omitted). Analytic dissection, as the defendants have done, is therefore improper."

As such a genuine issue of material fact as a matter of law on the question of substantial similarity has been shown. The Courts below ruled in defect in granting Respondents' Motion for Summary Judgment in dismissing the copyright claims of Mihalek as a matter of law.

THE COURT OF APPEALS ERRED IN AFFIRMING THE SUMMARY JUDGMENT ON THE FIFTH AMENDMENT TAKING CLAIM

The Fifth Amendment provides in part as follows: "nor shall private property be taken for public use, without just compensation."

In order to make out a claim for a taking of property by the state, three basic elements must be shown, namely (1) state action, (2) that a property right is involved and (3) that there exists an unreasonable deprivation of the property for public use.

STATE ACTION

There is no real dispute in this case that the actions complained of by Mihalek were in fact state actions of the Respondents. In particular, the State of Michigan both financed and actively promoted the "Say Yes to Michigan" campaign throughout the State of Michigan and numerous other states. In addition, there were numerous state officials, acting in their official capacity, who visited Mihalek's home office for the purpose of viewing his advertising and promotional materials (Appendix page 139).

PRIVATE PROPERTY RIGHTS

Conversely, there is a dispute as to whether the Advertising Program of Mihalek constitutes a property right which is protectible under the Fifth Amendment to

the Constitution. Mihalek contends that the Advertising Program is in fact property which is protectible under the Fifth Amendment while the Respondents contend that it is not.

It is well established that the Fifth Amendment protects all types of property from being taken by state action and without compensation. For example, see Perry v. Sindermann, 408 U.S. 593, 33 L. Ed. 2d 570, 92 S. Ct. 2694 (1972). It is clear that advertising slogans, promotional schemes and the like constitute a business property which is protectible against misappropriation. Despite this, the District Court in granting the Defendant's Motion for Summary Judgment ruled in effect that the Advertising Program of Mihalek did not constitute property which was protectible under the Fifth Amendment. Specifically, the District Court, when rendering its decision, said:

> "It does not seem to me that this is the kind of . . .for the further reason, it does not seem to me that this is the kind of matter than can be protected under the Fifth Amendment and based upon the facts produced in this particular case." (Appendix 745)

In this regard, the District court erred; the Fifth Amendment protects "a broad range of interests" (Perry, supra).

DEPRIVATION FOR PUBLIC USE

There is a material issue of fact as to whether the Respondents deprived Mihalek of its business property for public use. The State of Michigan has submitted affidavits (Appendix page 131) indicating that it did not misappropriate Mihalek's property. Conversely, Mihalek has also submitted numerous affidavits (Appendix page 103) showing numerous similarities between the promotional campaign devised by Mihalek and the promotional campaign engaged in by the State of Michigan such that copying can be reasonably inferred. Access is admitted by both Mihalek and Respondents. In addition, there are numerous other facts from which a reasonable inference can be drawn that the State of Michigan misappropriated Mihalek's Advertising Program. For example, numerous state officials traveled from Lansing to Brighton, Michigan (a round trip of 80

miles) in order to view the Advertising Program prepared by Mihalek.

In any event, whether or not the State has misappropriated Mihalek's business property is a question of fact to be determined by the jury. As such it cannot be determined on a motion for summary judgment.

In its final judgment, the District Court granted Summary Judgment in favor of the State with respect to the Fifth Amendment saying:

> "The Motion for Summary Judgment in favor of state defendants on the Fifth Amendment count is GRANTED because there was no taking of Plaintiff's property."

The precise basis for this decision is unclear to Mihalek. However, in view of the court's comments at oral argument, supra, Mihalek believes that the Court reached its decision that "there was no taking of Mihalek's property" because Mihalek's Advertising Program does not constitute property. If this is the case, then the District Court committed reversible error since Advertising Programs do constitute "property" as discussed previously.

Conversely, if the Court decided that Mihalek's Advertising Program did constitute property but there was not taking, then the District Court erred in deciding a material question of fact; see John W. Shaw Advertising, Inc. v. Ford Motor Company, 112 F. Supp. 121 (D. Ill. 1953).

The Fifth Amendment issue was squarely before the Court of Appeals (see appeal number 85-1986). However, in its March 18, 1986 judgment against Mihalek, the Court ducked the issue.

Mihalek's Petition for Rehearing, dated March 30, 1987 stated in part:

> . . ."The Fifth Amendment issue was argued below, decided below, appealed, fee paid (85-1986), briefed, argued on the appeal before the Court and simply not addressed by this Court. Since the Fifth Amendment issue was not addressed in the decisions, Petitioners request decision on the Fifth Amendment issue by this Court:". . .

The essence of the Court of Appeals Order, dated June 8, 1987, stated there was no taking of Mihalek's property as a matter of law. Clearly, the remand on the issue of direct copying of Mihalek's copyrighted proposals

presents a question of fact as a matter of law. Copyright protected property constitutes a property right protected by the Fifth Amendment. The Court of Appeals is at error.

THE COURT OF APPEALS ERRED IN AFFIRMING THE SUMMARY JUDGMENT ON THE TRADEMARK ISSUE

For the reasons stated above at length, there is a question of fact as a matter of law involving the Federal Trademark Act, Title 15 U.S.C. Section 1125(a), specifically, false attribution constitutes a taking of property without authority.

CONCLUSION

The petition for a writ of certiorari should be granted.

September 8, 1987 Respectfully submitted,

/s/ JAMES M. DEIMEN
James M. Deimen (P 12635)
Burlington Office Center
Suite Two
325 East Eisenhower Parkway
Ann Arbor, Michigan 48108-3397
(313) 66-2-3159

No. _____

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1987

THE MIHALEK CORPORATION AND
LAWRENCE PATRICK MIHALEK,
Petitioners

v

THE STATE OF MICHIGAN, GOVERNOR JAMES J. BLANCHARD, THE DEPARTMENT OF COMMERCE OF THE STATE OF MICHIGAN, RALPH J. GERSON, Director, ROSS ROY, INC.,
Respondents

APPENDIX

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

James M. Deimen, Ph.D., J.D.
Patent, Trademark and Copyright Attorney
Professional Engineer
Burlington Office Center, Suite Two
325 East Eisenhower Parkway
Ann Arbor, Michigan 48108-3397
(313) 66-2-3159

RECOMMENDED FOR FULL TEXT PUBLICATION
See. Sixth Circuit Rule 24

Nos. 84-1851/1854, 85-1593/1986

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

THE MIHALEK CORPORATION and LAWRENCE PATRICK MIHALEK,
Plaintiffs-Appellants,

v.

THE STATE OF MICHIGAN, GOVERNOR JAMES J. BLANCHARD, THE DEPT. OF COMMERCE OF THE STATE OF MICHIGAN, RALPH J. GERSON, DIRECTOR, ROSS ROY, INC.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan.

Decided and Filed March 18, 1987

Before: MERRITT, WELLFORD and NORRIS, Circuit Judges.

WELLFORD, Circuit Judge. Lawrence Patrick Mihalek and his wholly owned corporation, Mihalek Corporation, collectively herein called Mihalek (as done in plaintiffs' brief, and as referred to by the district court), sued the State of Michigan, its governor, and its Department of Commerce and director, claiming, in effect, that these defendants misap-

propriated his copyrighted ideas and materials for a statewide advertising campaign promoting tourism and business and agricultural enterprise in the state. The background of this controversy is generally undisputed. Michigan officials, faced with the problems of recession in that state, decided during 1980 to develop an advertising and promotional campaign to foster awareness of the advantages of the state by way of tourism, agricultural and business advantages and attractions. A Washington, D. C., public relations firm was engaged to develop specific ideas and a campaign program to encourage greater enterprise and commerce within Michigan. A campaign styled "Say Yes to Michigan" was created and announced; later in 1984 a Detroit advertising firm was engaged to promote and develop this theme, which it called the "Yes M!CH!GAN" campaign.

Mihalek had initiated his own concept of a promotional program to help build a better general economic, business, and tourist climate in Michigan beginning in late 1980. He approached numbers of persons, to many or most of whom he was unknown, to try to familiarize them with his ideas and general campaign suggestions. Some of those whom he contacted and submitted materials were state officials or legislators. Mihalek had not held himself out as being in the advertising or public relations business prior to that time. His background had rather been in automobile sales and leasing. Mihalek called his proposal, "Michigan is Good News," and he incorporated a number of sketches, pictures and clippings about events giving an affirmative tone to opportunities in Michigan despite much bad news that affected the business climate and condition in that state. Mihalek copyrighted the materials in his proposed program at some point in his presentations and during the development of the so-called "Say Yes to Michigan" promotion.

With the assistance of his Michigan state representative, Mihalek was able to procure meetings with lower echelon state government officials initially and later arranged meet-

ings with Michigan Commerce Department officials to present his proposals. Several of the documents and materials were retained by state officials.

Mihalek contends that he was unaware that Michigan officials, including several with whom he had made contact and whom he had made a presentation while his work was in progress, were meeting with other public relation firms about Michigan's campaign. He claims that they received and used the ideas and materials he created without payment or recognition.

Michigan officials made arrangements, as stated, with well known and experienced public relations firms to carry out the "Say Yes to Michigan", and "Yes M!CH!GAN" programs, which defendant state officials had adopted and approved. Mihalek's suit followed, claiming infringement of copyright, violation of trademark, and violation of constitutional rights under 42 U.S.C. § 1983 (taking without due process and compensation), and pendent state claims for unfair competition and misappropriation of work product. Defendants do not deny that plaintiff is the holder of and has the right to the copyrighted materials or trademark materials in dispute, described collectively as the "Michigan is Good News" campaign.

Defendants moved to dismiss the complaint and amended complaint, urging Eleventh Amendment immunity and denying any misappropriation as charged. The district court, after a full discussion of the immunity contention, dismissed many of Mihalek's claims. *See* 595 F. Supp. 903 (E.D. Mich. 1984). The court, in effect, reduced the claims to petitions for injunctive relief against individual state officers. Prior to Mihalek's suit in federal court, Michigan had sued Mihalek in state court seeking and obtaining a temporary restraining order to prevent Mihalek's interference with Michigan's public relations campaign then in progress in 1984. The state action was removed to federal court and the cases were consolidated.

The district court judge also later held that after personally examining Mihalek's materials and those of the State of Michigan utilized in its "Say Yes to Michigan" and "Yes M!CH!GAN" campaigns, they were not substantially similar as a clear matter of fact, and further, as a matter of law there was no material issue in dispute to preclude his granting defendants' motion for summary judgment in the remaining claims for injunctive and/or declaratory relief. Summary judgment was granted defendants on all federal causes of action, but the district court held that it lacked jurisdiction to adjudicate the pendent state law claims and ordered a remand of these claims to state court. As to the added defendant, the Detroit public relations firm utilized in Michigan's official campaign, the district court entered its summary judgment motion on all claims. The district court declined to reconsider its decision and this appeal ensued. This court has permitted a number of amicus curiae briefs to be filed and has permitted on a limited basis amicus curiae participation in oral argument.

With respect to the infringement of copyright claim, Mihalek makes the following assertions in his appellate brief:

> MIHALEK'S property, most of which is presently unpublished, were all properly protected under the provisions of the Copyright Act 17 U.S.C. §§ 101 et seq., 302(a). Notice of copyright was clearly placed on all of the works, even though not necessary for unpublished works, 17 U.S.C. § 401(a). Infringement thereof is therefore with actual notice of claim to copyright.
>
> MIHALEK created a wholly original advertising campaign, its "product" being the State of Michigan. What MIHALEK'S valid copyrights protect is the proposals and advertisements themselves, and as grouped together as a "compilation", see 17 U.S.C. § 101, definitions.

> MIHALEK devised a combination of expressions devised to sell the State of Michigan and to make people feel good about the State of Michigan, which were reduced to concrete form. It is *not* the product (THE STATE OF MICHIGAN), but the design, layout, arrangement, expression, portrayal and description in the advertisements and proposals, which are protected individually and as a whole, by copyrights to MIHALEK. With valid copyrights, the exclusive rights enumerated under 17 U.S.C. § 106(1), through (5), are attached to all of MIHALEK'S works.

The first appeal in these consolidated cases arises out of the district court's holding that (1) the state and its departments and officials acting for the state were immune under the Eleventh Amendment; (2) only prospective injunctive relief against state officials might be obtained even *if* plaintiff established his case; and (3) no effectual relief could be obtained from alleged state law violations. Judge Joiner found no entitlement to relief and plaintiffs appealed. After the factual finding of no substantial similarity and the legal conclusion that there was no copyright infringement, Judge Joiner entered summary judgment for defendants.[1]

We have jurisdiction of this appeal, as the state defendants concede, under the copyright and trademark claims.

Mihalek argues that summary judgment was inappropriate with respect to this issue, because, among other reasons, he presented affidavits by "average lay observers" to the effect that there was substantial similarity. He contends therefore that the affidavits presented a contested material issue precluding summary judgment. *Wickham* v. *Knoxville Int'l*

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[1]Other suits between Mihalek and Michigan officials were pending at the time of filing briefs in this case. We need not discuss these actions here.

Energy Exposition, Inc., 739 F.2d 1094 (6th Cir. 1984) cited by plaintiffs, holds that in copyright infringement cases summary judgment is "sparingly" granted, and that "an appellate tribunal must review the evidence in the light most favorable to the party opposing the judgment." *Id.* at 1097. We are mindful of these precautions in reviewing the district court's actions in granting summary judgment to the defendants. *Wickham*, however, involved our affirmance of a district court's grant of summary judgment in a copyright infringement action precisely because "[t]he district court correctly concluded that as a matter of law no substantial similarity existed between plaintiff's and defendants' works." *Id.* at 1097. The district court in *Wickham*, as did Judge Joiner, found "substantial design differences." There was therefore no proof of copying found and summary judgment was granted in *Wickham*, regardless of plaintiff's contentions that defendants had access and had misappropriated his copyrighted design material.

A finding of substantial differences between the copyrighted material and the alleged copy has been found to justify a judgment for the defendant in copyright infringement proceedings, *Reyher v. Children's Television Workshop*, 533 F.2d 87 (2d Cir.), *cert. denied*, 429 U.S. 980 (1976). The burden is on plaintiffs to prove substantial similarity between the copyrighted material and the allegedly infringing material. *Wickham*, 739 F.2d at 1097; *Durham Indus. v. Tomy Corp.*, 630 F.2d 905, 911 (2d Cir. 1980); *Sid & Marty Krofft Television Prod. v. McDonald's Corp.*, 562 F.2d 1157, 1172 (9th Cir. 1977); *Roth Greeting Cards v. United Card Co.*, 429 F.2d 1106, 1110 (9th Cir. 1970); *Clarke v. G. A. Kayser & Sons*, 472 F. Supp. 481, 482 (W.D. Pa. 1979), *aff'd mem.*, 631 F.2d 725 (3d Cir. 1980).

In this case the materials themselves bespeak the expressions of the general ideas involved in a public relations campaign. It is the expressions of the ideas, not the general concepts, that are to be examined particularly, because ideas

themselves and general concepts are not copyrightable. *Reyher*, 533 F.2d at 91; *Wickham*, 739 F.2d at 1097.

> While the demarcation between idea and expression may not be susceptible to overly helpful generalization, it has been emphasized repeatedly that the essence of infringement lies in taking not a general theme but its particular expression through similarities of treatment, details, scenes, events and characterization. . . .
>
> The question which remains is whether defendants in the instant case utilized the idea in Reyher's book or instead descended so far into the concrete as to invade her expression.

Reyher, 533 F.2d at 91.

In this case the works, materials, and expressions of Mihalek as compared with those utilized in the State's campaign are crucial and determinative, not the opinions of lay observers, who have made no careful determinations of the entire concepts involved.[2] *See Wickham*, 739 F.2d at 1097; *Decorative Aides Corp. v. Staple Sewing Aides Corp.*, 497 F. Supp 154, 157 (S.D.N.Y. 1980), *aff'd mem.*, 657 F.2d 262 (2d Cir. 1981); *Clarke*, 472 F. Supp. at 482. All this pertinent evidence was before the district court to be examined as to the materials in dispute. We are unable to say the materials

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[2]Plaintiff also argues that a state Department of Commerce official conceded that there were some similarities in what Mihalek presented and what Michigan utilized in its campaign, "Say Yes to Michigan." What that official stated, however, was that he had the impression of "some similarity in concept . . . [both were] involved with trying to create good feelings about Michigan. . . . [T]hey wanted to bring good things out about Michigan." This shared general idea or concept to "create good feelings about Michigan," is not, of course, any material evidence to indicate that there was substantial similarity as to the details, means and specific methodology of accomplishing an advertising program to promote Michigan.

raised a genuine issue of material fact as to substantial similarity, even giving plaintiffs the benefit of all favorable inferences to be drawn. The court's conclusion that as a matter of law plaintiffs had failed to demonstrate copying or infringement by first showing that there were substantial similarities is not erroneous. Indeed, this court has itself carefully examined the materials in the record and finds that there are no substantial similarities, taking into account the "particular expression" through "treatment, details, scenes, events and characterization." See *Reyher* 533 F.2d at 91. The fact that plaintiffs envisioned a promotional campaign featuring the use of tee shirts, hats, slogans, pictures, and promotional events, and that the campaigns utilized by the State of Michigan incorporated these generally universal ideas, among many many other devices, in a public relations program to spotlight affirmative things about the State of Michigan is not any indication of similarity where the individual clothing items, slogans, pictures and events were substantially different.

We do not find *Blumcraft of Pittsburgh v. Newman Bros.*, 373 F.2d 905 (6th Cir. 1967), relied upon by plaintiffs, to be contrary to the district court decision. There the district court had before it the affidavit of an expert in the very field of dispute, an architect, who testified by "tracing paper comparison" that there had been actual copying, and this court on review indicated that "[s]ubstantial similarity between the two illustrations in question is obvious." *Id.* at 907. The facts and circumstances in *Blumcraft* are significantly different from those in the instant case. We are not persuaded by other authority cited by plaintiffs where infringement was found or indicated. Some authority involved an alleged patent violation, others involved admissions and concessions in copyrighted music cases where records were played without permission. We have considered carefully the authorities relied upon by plaintiffs, including *Wickham*, *Krofft Television*, and *Roth Greeting Cards*, and find them unpersuasive as to plaintiff's contentions on this

issue. *International Luggage Registry v. Avery Products*, 541 F.2d 830 (9th Cir. 1976), for example, another case cited by plaintiff, is not comparable. It involved alleged copies of copyrighted luggage labels, which the appellate court found upon "casual examination . . . reveals a marked likeness." As a consequence, it could not be said "as a matter of law that there is no substantial similarity." *Id.* at 831. (Similarly, *Peter Pan Fabrics v. Martin Weiner Corp.*, 274 F.2d 487 (2d Cir. 1960) involving a "deliberate copyist" who had offered no evidence in defense of a copyright infringement claim is not persuasive under the circumstances of the instant case.)

"A general impression of similarity is not sufficient to make out a case of infringment", *Durham Indus.*, 630 F.2d at 912. "Just as copyright protection extends to expression but not ideas, copyright protection extends only to the artistic aspects, but not the mechanical or utilitarian features, of a protected work" and "only *substantial* similarity will support a determination of infringement." *Id.* at 913. Finally, "[a]s a matter of logic as well as law, the more numerous the differences between two works the less likely it is that they will create the same aesthetic impact so that one will appear to have been appropriated from the other." *Id.*, (citing *Herbert Rosenthal Jewelry Corp. v. Honora Jewelry Co.*, 509 F.2d 64, 65-66 (2d Cir. 1974)).

In this case the district court carefully examined the extensive programs and materials involved and concluded, as a matter of law that an average reasonable layperson upon such examination could not find substantial or sufficient similarity to establish copyright infringement. We have attempted to duplicate that examination and conclude that there is simply no substantial similarity involved in the two public relations programs or campaigns in dispute, and there is no demonstrated evidence of copying or wrongful appropriation of plaintiff's copyrighted expressions. Compare *Wickham*, where the court found no substantial similarity and a number of significant differences, as is the situation here. Compare

also the situation and analysis in *Clarke*, with the instant case; *Clarke* also involved affirmance of a grant of summary judgment to a defendant in a copyright infringement case.

Accordingly, we AFFIRM the judgment of the district court that there is no copyright infringement established because of a lack of substantial similarity between the products.

Mihalek also contends that defendants have violated the Lanham Act (15 U.S.C. 1125(a)).[3] This claim involves whether there has been a violation of the Act's prohibition against a "false designation of origin." This, in turn, requires an investigation into whether the works or campaign materials utilized by Michigan and the defendants are likely to cause confusion to the general public as to the origin of these materials. Mihalek claims that defendants "falsely attributed" to public relations firms inside and outside of Michigan and to state officials involved in the Michigan promotions at issue his expressions, business ideas, slogans, promotional schemes and campaigns in violation of the Lanham Act. (Brief for Appellant, 4/18/86 at 16.)

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[3]This Lanham Act section provides:

> Any person who shall affix, apply, or annex, or use in connection with any goods or services, or any container or containers for goods, a false designation of origin, or any false description or representation, including words or other symbols tending falsely to describe or represent the same, and shall cause such goods or services to enter into commerce, and any person who shall with knowledge of the falsity of such designation of origin or description or representation cause or procure the same to be transported or used in commerce or deliver the same to any carrier to be transported or used, shall be liable to a civil action by any person doing business in the locality falsely indicated as that of origin or in the region in which said locality is situated, or by any person who believes that he is or is likely to be damaged by the use of any such false description or representation.

15 U.S.C 1125(a).

We have dealt with such a claim recently in *Frisch's Restaurants, Inc. v. Elby's Big Boy*, 670 F.2d 642 (6th Cir.), *cert. denied*, 459 U.S. 916 (1982) and set forth the factors to be considered with regard to similarity and likelihood of confusion. *See also Chevron Chem. Co. v. Voluntary Purchasing Groups, Inc.*, 659 F.2d 695 (5th Cir. 1981), *cert. denied*, 457 U.S. 1126 (1982). This issue of violation under the Lanham Act presents an asserted federal cause of action.

Plaintiff contends that a factual issue concerning a Lanham Act violation has been raised by certain layperson affidavits filed to the effect that they believed that based on materials which they viewed in the course of the State of Michigan's "Say Yes to Michigan" and "Yes M!CH!GAN" campaigns, they may have been borrowed from Mihalek or that Mihalek must have been involved in these promotions. These contentions and the affidavits have been discussed in the earlier portion of this opinion dealing with the allegations of copyright infringement. Based upon the district court's own observations of the materials, the court found no substantial similarity involved, therefore no likelihood of confusion, and no false designation of origin exist as plaintiff is required to prove in this type of trademark violation claim. The district court, accordingly, determined there was no material issue in dispute on the trademark claim that would preclude the grant of summary judgment to defendant on this issue.

Essentially for the reasons discussed fully on the copyright infringement claim, we find no error in the district court's determination. After a careful examination of the materials claimed to be protected under the Lanham Act and the particulars involved in the campaigns, we find no error in the findings of the court below. There is no substantial similarity in the products, or in the "marks" utilized, nor any substantial evidence of *actual confusion* based on side-by-side examination or comparison of Mihalek's work product as compared to that utilized by defendants.

As in the copyright infringement context, the trademark violation claim involves necessarily a careful comparison of the works or product claimed to be infringed or falsely designated or represented to determine similarity. In this kind of controversy as observed in *Litchfield v. Spielberg*, 736 F.2d 1352, 1355-56 (9th Cir. 1984), *cert. denied*, 470 U.S. 1052 (1985), summary judgment may be "appropriate . . . if reasonable minds could not differ as to the absence of substantial similarity in expression. *See v. Durang*, 711 F.2d 141, 143 (9th Cir. 1983)." This trademark claim raises similar issues to the copyright claim as to substantial similarity, and if no substantial similarity is determined, then the trademark claim must also fail. *See Litchfield*, 736 F.2d at 1358; *Durham Indus.*, 630 F.2d at 918; *Warner Bros., Inc. v. American Broadcasting Co.*, 720 F.2d 231, 246 (2d Cir. 1983).

The trial court considered the evidence presented relative to similarity or non-similarity and simply found no copyright or trademark violations involved within the meaning of the Lanham Act. We also AFFIRM this decision by the district court.

Having decided that there was no error in granting defendants' motion for summary judgment on the copyright and trademark claims, because there was no substantial similarity in the programs in dispute and therefore no infringement or violation by defendants as a matter of law, we next consider the other issues raised in appellant Mihalek's brief.

Following dismissal of some of Mihalek's claims in October of 1984 on the basis of immunity, plaintiff sought to serve on original defendants a "verified amendment" including "proposed class actions" under Fed.R.Civ.P. 23. Mihalek's alleged principal purposes in filing the amendment were to toll the statute of limitations, 17 U.S.C. § 507(b), with respect to certain defendants while an appeal was pending from the decision based on Eleventh Amendment immunity; and to add private parties who were involved in the promotional campaign utilized by the State of Michigan. The State moved

to strike the amendment as a harassment effort and an attempt to accomplish through this means what the court had precluded in its prohibition against Mihalek's serving additional copyright notices and claims on those doing business with the state except for the addition of Ross Roy, Inc., the Detroit advertising agency, as a defendant.

In view of our holding that neither the copyright claim nor the trademark claim is sustainable against the original named defendants and Ross Roy, we find it unnecessary further to consider this contention concerning the class action claim. We also find it unnecessary to discuss the difficult question as to whether state immunity applies to a copyright and/or trademark violation claim. These latter claims are the principal ones upon which plaintiff relies in this controversy, and a decision on the application of the Eleventh Amendment to these claims is rendered unnecessary in light of the decision made and reached that no copyright or trademark infringement has been established on this record as a matter of law.

> This Court has said repeatedly that it ought not pass on the constitutionality of an act of Congress unless such adjudication is unavoidable. This is true even though the question is properly presented by the record. If two questions are raised, one of non-constitutional and the other of constitutional nature, and a decision of the non-constitutional question would make unnecessary a decision of the constitutional question, the former will be decided.

Alma Motor Co. v. Timken-Detroit Axle Co., 329 U.S. 129, 136 (1946) (footnote omitted).

In summary, we affirm the summary judgment for defendants in this case, concluding for the reasons stated, based, among other reasons, on our examination of the record and the materials involved that there has been no copyright or trademark infringement demonstrated as a matter of law.

The denial of Mihalek's amendment is rendered moot under those circumstances. We find it unnecessary, therefore, to address the Eleventh Amendment immunity issue. We AFFIRM the judgment for defendants for the reasons stated.

ATTACHMENT B

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE MIHALEK CORPORATION
and LAWRENCE PATRICK
MIHALEK,

Plaintiffs-Appellants-Petitioners,

v.

File Numbers:
84-1851/1854
85-1593/1986

THE STATE OF MICHIGAN,
GOVERNOR JAMES J.
BLANCHARD, THE DEPARTMENT
OF COMMERCE OF THE STATE
OF MICHIGAN, RALPH J.
GERSON, DIRECTOR,
ROSS ROY, INC.,

Defendants-Appellees.

_____/

JAMES M. DEIMEN
RICHARD A. HEIKKINEN
DOUGLAS W. SPRINKLE
Attorneys for Plaintiffs-Appellants MIHALEK

HARRY G. IWASKO, JR.
PHILIP J. SMITH
Attorneys for Defendants-Appellees STATE

MICHAEL M. HATHAWAY
Attorney for Defendant-Appellee ROSS ROY, INC.

APPEAL FROM THE UNITES STATES
DISTRICT COURT FOR THE
EASTERN DISTRICT OF MICHIGAN

PETITION FOR REHEARING

Plaintiffs-Appellants, by and through their attorneys, James M. Deimen, Richard A. Heikkinen and Douglas W. Sprinkle, Petition for Rehearing pursuant to F.R.A.P. 40 in the above captioned consolidated appeals as follows:

This Court has reached and filed March 18, 1987 decisions with respect to the copyright and trademark claims and the 11th Amendment issue involving Petitioners' advertising program and, although Petitioners disagree with the Court, this Petition is not directed to these issues at this time. However, there are two issues that this court neglected to reach and must reach:

The Fifth Amendment issue was argued below, decided below, appealed, fee paid (85-1986), briefed, argued on the appeal before this Court and simply not addressed by this Court. Since the Fifth Amendment issue was not addressed in the decisions, Petitioners request decision on the Fifth Amendment issue by this Court;

and

With respect to the copyright issue, there are two separate issues; first, the advertising program itself and second, the direct copying by Defendants of Petitioners' unpublished secret advertising program plan, copyright registration number TXu-139-833. This Court has

decided against Petitioners on the advertising program itself reasoning that the Petitioners' and Defendants' advertising programs in question were not substantially similar. Petitioners vehemently disagree, but are not asking this Court to reconsider the substantial similarity issue at this time. Clearly, however, this Court's decision does not apply to the direct photocopying by the Defendants of Petitioners' copyrighted advertising program plan at the direction of two of the highest officials in the Michigan Department of Commerce. These officials were responsible for the planning, development and implementation of Defendants' official advertising campaign. Photocopying by the Defendants of the two advertising program plan documents owned by Petitioners in violation of Petitioners' explicit written instructions constitutes copyright infringement as a matter of law. By definition the copies are not only substantially similar, they are identical. Therefore, since this issue was argued below, decided below, appealed, fee paid (85-1986), briefed, argued on the appeal and simply not addressed by this Court in its decisions, Petitioners request decision on the direct copying issue by this Court.

In the event that either of these two undecided issues are decided in Petitioners' favor, the 11th

Amendment issue must be reached to determine liability in the Defendants.

Dated: March 30, 1987

Respectfully submitted,

/s/ JAMES M. DEIMEN
James M. Deimen (P 12635)
325 East Eisenhower Pkwy
Suite Two
Ann Arbor, MI 48108-3397
(313) 994-5947

ATTACHMENT C

NOS. 84-1851/1854/85-1593/1986

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

THE MIHALEK CORPORATION AND LAWRENCE PATRICK MIHALEK, Plaintiffs-Appellants, v. THE STATE OF MICHIGAN, GOVERNOR JAMES J. BLANCHARD, THE DEPT. OF COMMERCE OF THE STATE OF MICHIGAN, RALPH J. GERSON, DIRECTOR, ROSS ROY, INC., Defendants-Appellees.	)	ORDER

BEFORE: **MERRITT, WELLFORD,** and **NORRIS,**
Circuit Judges

We filed an opinion in this cause on March 18, 1987, affirming the decision of the district court and denying plaintiffs the relief sought for alleged misappropriation of their copyrighted and trademark materials and ideas in the advertising plan in controversy. The petition for rehearing asserts that we failed to reach two issues in our prior opinion. First, the misappropriation claim included

the contention that defendants, through governmental and state action, had taken their property without compensation within the meaning of the fifth amendment. Our opinion does not specifically mention the fifth amendment claim. It is clear, however, that our holding was to the effect that as a matter of law there was no "taking" of plaintiff's materials and concepts and those utilized by defendants. We found no error in the district court's conclusion that defendants had not used, appropriated, or benefitted from plaintiffs' property in the form of ideas, materials, or advertising concepts. There was, then, no violation of plaintiffs' claimed fifth amendment rights.

Plaintiffs also assert that we failed to address their claims of "direct photocopying by defendants" of "copyrighted advertising program plan at the direction of two of the highest officials in the Michigan Department of Commerce." This contention involves the statement made in plaintiffs' brief that two state officials had kept two photocopies of some of the copyrighted material. This photocopying was assertedly discovered during plaintiffs' Michigan Freedom of Information Act investigation following selection by defendants of another advertising program.

It is not clear whether defendants asserted "fair use" as an affirmative defense in this case, nor whether there may have been a technical, although possibly de

minimis non curat lex violation of 17 U.S.C. § 106 in the alleged retention of photocopies by two state officials. This question was not specifically addressed by the district court in his decision nor does it appear that this failure to address this issue was called to his attention by the parties. We believe it is best for the district court in the first instance to address this contention. We therefore **REMAND** the question of alleged photocopying by state officials and whether, if it occurred, this constituted a violation of plaintiffs' claimed rights in any respect in light of the record made by the parties.

ENTERED BY ORDER OF THE COURT

/s/ JOHN P. HEHMAN
CLERK

ATTACHMENT D

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE MIHALEK CORPORATION and LAWRENCE PATRICK MIHALEK,

Plaintiffs,

Civil Action
No. 84-CV-7202-AA

v

HONORABLE
CHARLES W. JOINER

THE STATE OF MICHIGAN, GOVERNOR JAMES J. BLANCHARD, THE DEPARTMENT OF COMMERCE OF THE STATE OF MICHIGAN, RALPH J. GERSON, DIRECTOR,

Defendants.

_____/

JAMES M. DEIMEN
Ann Arbor, Michigan
RICHARD A. HEIKKINEN
THE HEIKKINEN LAW FIRM, P.C.
Howell, Michigan
Attorneys for Plaintiffs

THOMAS A. HALLIN
HARRY G. IWASKO, JR.
PHILIP J. SMITH
Assistant Attorneys General
Lansing, Michigan
Attorneys for Defendants

MEMORANDUM OPINION AND ORDER

This case is before the court on defendants' motion to dismiss or in the alternative, for change in venue. For reasons stated herein, the motion to dismiss is granted in part, and the motion for change of venue is denied.

In brief summary, the action is one for infringement of copyright, violation of trademark, and violation of constitutional rights brought pursuant to 42 U.S.C. § 1983, along with a pendent state claim for unfair competition and misappropriation of work product. Plaintiff[1] was the registered holder of certain copyrighted materials, which are collectively described as the "Michigan is Good News" campaign. Plaintiff alleges that he entered into agreements with agents of the State of Michigan for creation of these materials. He showed the materials to these people while the work was in progress, and the agents alledgedly appropriated the designs for their own use, incorporating them into the "Say Yes to Michigan" and "Yes M!ch!gan" campaigns, which are well known promotional operations designed to encourage investment and travel in this state. Plaintiff

[1]The complaint alleges that the copyrights are currently held by the corporate plaintiff, of which the individual plaintiff is apparently the sole shareholder. For purposes of this opinion, the term "plaintiff" will be used to designate both plaintiffs.

alleges that he was never paid for his efforts in developing the designs, and that the wrongful appropriation of the designs supports the various causes of action alleged in the complaint, which seeks money damages and injunctive relief.

The defendants in this action are the State of Michigan, the Department of Commerce of the State, James Blanchard, the Governor, and Ralph Gerson, the Director of the Department of Commerce.

DISCUSSION

Motion to Dismiss

All defendants have moved to dismiss the complaint, arguing that, despite the presence of individual state officials as parties defendant, the action is one against the state, and therefore barred by the eleventh amendment. Plaintiff has responded to this motion with the argument that the eleventh amendment does not bar an action against the state and state officials for infringement of copyright, relying exclusively on Mills Music v. State of Arizona, 591 F.2d 1278 (9th Cir. 1979). The court in Mills Music did expressly hold that, by enacting the Copyright Act, 17 U.S.C. § 1 et seq. pursuant to the authority granted to it by the Copyright and Patent Clause of the United States

Constitution, Art. 1, § 8, Cl. 8, Congress has specifically authorized private actions against a class of defendants that includes states, and thereby abroggated the states' eleventh amendment immunity, id. at 1284-85.

With the exception of Wihtol v. Crow, 309 F.2d 777 (8th Cir. 1962), which simply held without discussion that the eleventh amendment barred an action against a local school district, as an instrumentality of the state, for copyright infringement, Mills Music appears to be the only case directly on point. Although the opinion reflects a thorough and thoughtful discussion of recent eleventh amendment jurisprudence, this court is compelled to conclude that Mills Music was decided incorrectly, insofar as it held that an action for damages could be maintained against a state for infringement.

In Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974), the Supreme Court held that the eleventh amendment barred an action against a state for recovery of benefits to which the plaintiffs were entitled under the Aid to Aged, Blind, and Disabled program, established by the Social Security Act. The Court concluded that, insofar as the District Court had ordered the Director of the Department of Public Aid of Illinois to make payments to the plaintiffs on the basis of benefits wrongfully denied prior to the entry of the decree by the District Court, that order constituted a form of "retroactive relief" that was barred by the

eleventh amendment. The Court distinguished between this kind of retroactive relief, which was analogous to an award of money damages for injuries sustained prior to entry of the judgment, and "prospective relief" in the form of an injunction, requiring the defendant to conform its future conduct to legal requirements, id. at 678, 94 S.Ct. at 1363. The Court thereby reconciled the historic opinion of Ex Parte Young, 209 U.S. 123, 28 S.Ct. 441, 52 L.Ed. 714 (1908), in which it held that an action for equitable relief, brought under 42 U.S.C. § 1983, charging a state official with unconstitutional conduct in the exercise of his official duties, was not barred by the eleventh amendment, with Ford Motor Co. v. Department of Treasury, 323 U.S. 459, 65 S.Ct. 347, 89 L.Ed. 389 (1945), in which it held that an action for recovery of damages from a state official, in which judgment would have to be paid from the state treasury, was subject to the sovereign immunity defense established by the amendment.

The holding in Edelman was subsequently reaffirmed in Quern v. Jordan, 440 U.S. 332, 99 S.Ct. 1139, 59 L.Ed.2d 358 (1979), which arose from the same action as Edelman. The Quern Court concluded that cases decided subsequent to Edelman, particularly Hutto v. Finney, 437 U.S. 678, 98 S.Ct. 2565, 57 L.Ed.2d 522 (1978) and Monell v. New York Department of Social Services, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611

(1978), did not undermine in any way Edelman's conclusion that enactment of the Civil Rights Act of 1871, currently codified in 42 U.S.C. § 1983, did not abrogate the states' sovereign immunity under the eleventh amendment, Quern, supra, 440 U.S. at 339-41, 99 S.Ct. at 1144-45.

Although neither Edelman nor Quern dealt with the precise issue presented in this motion to dismiss and answered in the affirmative by the Mills Music court, that is, did enactment of the Copyright Act abrogate the eleventh amendment immunity of the states, this court concludes that those opinions from the Supreme Court compel a different result from that reached in Mills Music. Although the federal interest in patent and copyright law is expressly declared in the body of the Constitution itself, it is the Copyright Act which establishes the substantive legal right to be free from infringement which is the basis for the relief sought in this case by plaintiff. As such, the right to be free from infringement, although a substantial one guaranteed by federal law, is deserving of no more protection than is the right to benefits for the aged, blind, and disabled, which rights were also expressly established by act of Congress. Despite the existence of a Congressional guaranty to these benefits, the Supreme Court concluded that a federal court is without jurisdiction, by operation of the eleventh amendment, to impose an award of

damages against a state, or against its agents when the award would compel an invasion of the coffers of the state, for violation of federal law.

This court holds that all defendants in this action are entitled to immunity under the eleventh amendment from plaintiff's prayer for money damages under each of his four theories of liability. Further, the recent decision of Pennhurst State School v. Halderman, ____ U.S. ____, 104 S.Ct. 900, 79 L.Ed.2d 67 (1984), makes clear that the eleventh amendment also prohibits federal courts from awarding injunctive relief against state officials for claims predicated upon state law. Insofar as plaintiff's claim for disclosure of trade secrets, unfair competition, and misappropriation of word product is grounded upon state statutory or common law, that claim can not support an action for injunctive relief against these defendants under the reasoning of Pennhurst. To the extent that plaintiff is seeking injunctive relief against future violations of his federally protected rights, by the individual defendants, the eleventh amendment offers no protection to the individual defendants, Ex Parte Young, supra. The State itself, and the Department of Treasury, are immune from suit altogether, however, Hans v. Louisiana, 134 U.S. 1, 10 S.Ct. 504, 33 L.Ed. 842 (1890), Employees v. Department of Public Health and Welfare, 411 U.S. 279, 93 S.Ct. 1614, 36 L.Ed.2d 251 (1973).

Motion for Change of Venue

Venue in this case is predicated upon the Patents and Copyright Venue statute, 28 U.S.C. § 1400, with respect to the copyright claims, and upon the general venue provision, 28 U.S.C. 1391(b) with respect to the other claims. Defendants urge that venue does not properly lie in this court with respect to the instant claims under either statute.

Section 1391(b) of Title 28 provides as follows:

> (b) A civil action wherein jurisdiction is not founded solely on diversity of citizenship may be brought only in the judicial district where all defendants reside, or in which the claim arose, except as otherwise provided by law.

Defendants accurately assert that venue of an action against public officials under this statute is properly laid in the judicial district in which the official maintains his official residence, O'Neill v. Battisti, 472 F.2d 789 (6th Cir. 1972). The individual defendants in this action, Governor Blanchard and Secretary of Treasury Gerson, maintain their official residences in Lansing, Michigan, which is located in the Western District of Michigan. This court therefore lacks venue for the trademark infringement and § 1983 claims against those defendants.

Section 1500(a) of Title 28 provides as follows:

> (a) Civil actions, suits or proceedings arising under any Act of Congress relating to copyrights may be instituted in the district in which the defendant or his agent resides or may be found.

This subsection provides a less restrictive venue standard than does either § 1391 or subsection (b) of § 1400, Time Incorporated v. Manning, 366 F.2d 690, 697 (5th Cir. 1966).

Plaintiff argues that the State of Michigan maintains a liquor store in Ann Arbor, and that, because this agent is "found" in this district, venue is properly laid here under § 1400(b). Defendant contends, without citation to authority, that plaintiff's position is preposterous on its face, because the existence of a state-operated liquor store in this district should not be sufficient to vest this court with venue.

The court has conducted its own research into this matter, and finds nothing on point. The general rule of construction of § 1400(a) is that a defendant or his agent "may be found" in any district in which he is amenable to personal jurisdiction, or wherever he may validly be served with process, see Micromanipulator Co., Inc. v. Bough, 558 F.Supp. 36, 37 (D.Nev. 1982); Donner v. Tams-Witmark Music Library, 480 F.Supp. 1229, 1234 (E.D.Pa. 1979).

The court concludes that venue is properly laid in this district, but not for the reasons set forth by

plaintiff. The individual defendants, the Governor and the Secretary of Commerce, are amenable to personal jurisdiction throughout this state, including the area comprised by the Eastern District of this state, see Michigan GCR 105.9 and RJA § 701 [M.C.L.A. § 600.701] (personal jurisdiction over individuals). Further, the Department of Commerce may be sued in this district for the same reasons. This result is especially appropriate in this case, because the acts which constitute the alleged infringement of plaintiffs' copyrights occurred throughout the state, including this district. Further, because venue is proper in this court with respect to the copyright infringement claims, this court, in the interests of efficiency, will retain the trademark infringement and constitutional claims, insofar as they seek injunctive relief, even though those claims, had they been brought without the copyright claim, would not have been sufficient to vest this court with venue against these defendants, see Carolyn Chenilles, Inc. v. Ostow & Jacobs, Inc., 168 F.Supp. 894 (S.D.N.Y. 1958).

For the foregoing reasons the motion for change of venue is denied.

SO ORDERED.

/s/ CHARLES W. JOINER
HONORABLE CHARLES W. JOINER
U.S. District Judge

Dated: October 12, 1984

ATTACHMENT E

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE MIHALEK CORPORATION
and LAWRENCE PATRICK MIHALEK

Plaintiffs,

Civil Action
No. 84-CV-7202-AA

v

HONORABLE
CHARLES W. JOINER

THE STATE OF MICHIGAN,
GOVERNOR JAMES J.
BLANCHARD, THE DEPARTMENT
OF COMMERCE OF THE STATE
OF MICHIGAN, RALPH J.
GERSON, DIRECTOR,
ROSS ROY, INC.,

Defendants.
_____/

RICHARD A. HEIKKINEN
THE HEIKKINEN LAW FIRM, P.C.
Howell, Michigan
DOUGLAS W. SPRINKLE
Birmingham, Michigan
Attorneys for Plaintiffs

THOMAS A. HALLIN
Assistant Attorney General
Lansing, Michigan
MICHAEL M. HATHAWAY
VANDEVEER, GARZIA
Detroit, Michigan
Attorneys for Defendants

MEMORANDUM OPINION AND ORDER

This case is before the court on plaintiff's motion for reconsideration of the court's oral ruling of April 17 and order entered April 24, granting defendants' motion for partial summary judgment; plaintiff's ex parte motion to strike from the court files defendants' response to the motion for reconsideration; and plaintiff's ex parte motion to extend the time to serve certain party defendants. For the reasons stated herein, the motion to strike defendants' response to the motion for reconsideration is granted. The motion for reconsideration and the motion to extend time for service are denied.

FACTS AND PROCEDURAL HISTORY

This case grows out of a controversy between plaintiffs Lawrence Mihalek and the Mihalek Corporation (hereafter jointly referred to as "plaintiff") and the State of Michigan and certain of its agents and agencies. The thrust of the case is that the state officials, and various advertising agencies working under contract with the state, appropriated plaintiff's work product, portions of which were registered under the federal copyright laws, and used those products to formulate its popular "Say Yes to Michigan" and subsequent "Yes Michigan" promotional

campaigns, which seek to encourage investment and travel in this state.

Resolution of these motions should be set against a recitation of the procedural history of this case. Defendant State of Michigan originally filed suit in state court, seeking to enjoin plaintiff from issuing notices of copyright infringement to certain media interests who were publishing items of the state's promotional campaign. Plaintiff subsequently filed a four count complaint in this court, alleging copyright infringement; trademark infringement; appropriation of property without compensation, in violation of the takings clause of the fifth amendment; and unfair competition.

The state court judge before whom the first action was filed initially entered a temporary restraining order against plaintiff herein, then disclaimed jurisdiction over the controversy in light of the presence of the copyright claims, over which exclusive federal court jurisdiction is granted by 28 U.S.C. § 1338. Plaintiff herein successfully removed the state court case to this court, and all subsequent litigation has proceeded under the case arising from the complaint filed by plaintiff.

On October 11, 1984, the court granted in part and denied in part defendant's first motion to dismiss, holding that the defendants were immune from damages by operation of the eleventh amendment. The case proceeded as an injunctive action. On October 25, the

court granted defendants' motion for a preliminary injunction, prohibiting plaintiff from filing further notices of copyright infringement. Plaintiff subsequently filed an amended complaint, seeking to establish a defendant class of media entities that had published the "Say Yes to Michigan" materials.

In February of this year, defendants moved to dismiss the amended complaint, or in the alternative to enjoin plaintiff from serving the complaint upon any of the proposed media defendants. Because plaintiff had neither moved for certification of a class of defendants, nor served the media entities named in the amended complaint, the court regarded this case as one against the four defendants named in the original complaint. At the hearing on defendants' motion to strike the amended complaint and to enjoin service, held on February 12, the court held that plaintiff could serve a copy of the complaint upon Ross Roy, Inc., in order to preserve his copyright claims against that defendant from operation of the statute of limitations, but forbade service on the other media entities, unless plaintiff made a particular showing that his rights were jeopardized with respect to each entity he sought to serve. The court concluded that the likely chilling effect on the state's promotional campaign resulting from service of the amended complaint on the media entities justified the relief granted.

Plaintiff's counsel subsequently contacted the chambers of this court to request an ex parte meeting with the judge. The asserted purpose of the meeting was to demonstrate to the judge the strength of plaintiff's copyright infringement claims. Plaintiff's counsel indicated that he believed that his case was threatened by what he presumed was the court's lack of conviction in the strength of the copyright claims.

The court convened an informal hearing, with all parties present, on February 21. The proceedings were recorded by the court reporter. Defendants' motion for summary judgment was pending before the court at that time and scheduled for hearing in April. The court did not conduct a hearing on the motion on February 21, and no rulings whatsoever were made by the court at that informal hearing, the purpose of which was merely to provide plaintiff with an opportunity to outline the factual allegations of the copyright infringement claims, with the use of physical evidence.

On April 17, the court heard and granted defendants' motion for partial summary judgment. The court concluded that the plaintiff had failed to demonstrate a genuine issue of fact concerning the substantial similarity between his copyrighted materials and the accused works that composed defendants' promotional campaign. Defendants conceded for the purposes of the motion that its agents had access to

plaintiff's copyrighted materials so as to enable them to copy those materials had they so intended.

DISCUSSION

Plaintiff's Motion to Strike
Defendants' Response

After plaintiff served his motion for reconsideration of the April 24 order, defendant filed a brief response with the court. Plaintiff subsequently moved ex parte to strike the response from the court's files, pursuant to Local Rule 17(k)(2), which provides that no response to a motion for reconsideration or rehearing shall be allowed unless the court otherwise directs. Although the court believes that the ex parte filing of this motion to strike was improper, it is bound by the old saw that two wrongs do not make a right. Consequently, the response will be stricken from the court's files in this matter, and was not and will not be considered in the court's ruling on plaintiff's motion for reconsideration.

Plaintiff's Motion for Reconsideration

Plaintiff urges four grounds for reconsideration of the April 24 order, as follows:

(1) the court's holding that there was no genuine issue of material fact concerning the absence of substantial similarity between the plaintiff's copyrighted works, and defendants' accused works, was erroneous as a matter of law, because the court failed to take into consideration the affidavits of several purported "lay observers", who asserted that they believed that defendants' promotional campaign had borrowed extensively from plaintiff's works;

(2) plaintiff was prejudiced in the preparation of his response to the motion for summary judgment by the failure of the court reporter to file a copy of the transcript of the informal February 21 hearing until April 29, almost two weeks after the hearing on the motion for summary judgment;

(3) the court improperly limited the hearing on the motion for summary judgment to 1-1/2 hours, thereby depriving plaintiff of an opportunity to call twelve witnesses available to testify on this matter, and to present additional documentary evidence in support of his response to the motion;

(4) the court applied an erroneous legal standard in ruling on the motion for summary judgment, using the forbidden "extrinsic test" of similarity, rather than the appropriate "intrinsic test".

The court will address these arguments in turn,

Failure to Consider Affidavits

Plaintiff has failed to cite the court to any authority for the proposition that the affidavits of the alleged "lay observers" have any bearing whatsoever on the issue of substantial similarity, for purposes of a motion for summary judgment. The case of Milene Music, Inc. v. Gotauco, 551 F.Supp. 1288 (D.R.I. 1982) is wholly inapposite. That case merely stands for the entirely reasonable proposition that affidavits of plaintiff's investigative agents, attesting to the occurrence of live public performances by alleged infringers, are admissible evidence and may be used to establish proof of such an occurrence.

The issue presented in defendants' motion for summary judgment is whether any reasonable jury could conclude, after viewing all of the evidence presented in support of and in opposition to the motion, granting all permissible inferences in favor of the plaintiff, that defendants' accused works were substantially similar to plaintiff's copyrighted works. Although the question of substantial similarity is generally one of fact for the jury, the presentation of a motion for summary judgment gives rise to a legal question of the existence of genuine question of material fact. Cf. Alexander v. Haley, 460 F.Supp. 40 (S.D.N.Y. 1978) (granting defendants' motion for summary judgment against claims of copyright

infringement, finding no substantial similarity between plaintiff's protectable works and defendant's works).

The issue should be further refined. Defendants have challenged the validity of plaintiff's copyrights, to the extent that he has attempted to claim protection over certain matters that are not the proper subject of copyright. In this regard, they argue that the only similarities between plaintiff's works and the Michigan promotional campaigns is that both address a common general subject: promotion of the state's natural and cultural resources. Defendants contend that plaintiff is attempting no less than to maintain a copyright over the enterprise of promoting the state of Michigan.

There are of course limitations on the subject matter that can be protected by copyright. Matters of historical or contemporaneous fact, material traceable to the public domain or folk custom, "scenes a faire" (such as incidents, characters or settings which are as a practical matter, indispensable in the treatment of a given topic), and cliched language are examples of subjects over which an author cannot claim exclusive use. See Alexander v. Haley, 460 F.Supp. at 44-46. Thus, the fact that both plaintiff and the creators of the state's campaigns sought to extol certain features of the state can not form the basis for an action of infringement. The question before the court becomes whether those portions of the plaintiff's works that are protectable by copyright,

those expressions which are original to his creation, are substantially similar to the accused works.

Faced with such a motion, the court must conduct a side-by-side examination of the two sets of works, and determine if a reasonable jury could find such a substantial similarity. See Clarke v. G.A. Kayser & Sons, Inc., 472 F.Supp. 481, 482 (W.D. Pa. 1979).

Prior to the hearing on the motion, the court was presented with voluminous physical evidence by both sides, purporting to represent the documentary manifestations of plaintiff's copyrighted works, and the state's promotional campaigns. The court conducted an examination prescribed by the Clarke opinion prior to the hearing on the motion. As a result of this examination, and in light of the arguments of counsel at the hearing on the motion, the court found that there was no substantial similarity between the defendant's promotional campaigns, and those portions of plaintiff's registered works that were protectable by the copyright laws, either viewing those works as integrated wholes, or in terms of their constituent elements. As the court's ruling on the motion for summary judgment indicates, the court further found that there could be no genuine question of material fact on this issue.

In coming to this conclusion, the court did not and could not take into consideration the affidavits filed by plaintiff, representing the conclusions of purported

average lay observers, that the two sets of works were substantially similar.

First, plaintiff has failed to establish that these persons were in fact "average lay observers". Indeed, the affidavits betray a strong sense of sympathy for plaintiff, and a concomitant inability to evaluate the evidence objectively.

Second, there is no indication from the affidavits that the affiants applied the correct legal standard. The affiants variously recite that upon viewing the media publications of the state's promotional campaign, they believed that the state had either hired plaintiff to develop the campaign, or else had improperly borrowed plaintiff's works in developing the campaign. These statements do not go to the precise issue of whether or not there is a substantial similarity between the two works.

Finally and most fundamentally, the affidavits are an irrelevant form of evidence for purposes of the issue presented by the defendant's motion. As indicated above, the question of whether or not there exists a genuine question of material fact with respect to the issue of substantial similarity is one of law for the court. The proper inquiry is whether or not a hypothetical jury, impaneled in this case and presented with plaintiff's proofs of infringement, could reasonably conclude that the two sets of works were substantially similar. The

court must, in effect, set the minimum legal standard for submission of the case of jury deliberation.

Taken in a manner most favorable to the plaintiff, the affidavits can be construed to indicate that the affiants themselves believe that there is a substantial similarity between the two bodies of works. But the affiants can not substitute their judgment for that of the court with respect to establishing the minimum standard.

Late Filing of the Transcript of the February 21 Hearing

Plaintiff contends that he was prejudiced by his inability to secure a copy of the transcript of the February 21 informal hearing for use in opposition to the defendant's motion for summary judgment. Although some of the same issues that were raised by the defendant's motion for summary judgment were addressed at that informal hearing, the court fails to understand how plaintiff was prejudiced in any way by absence of a transcript. The court made no findings nor rulings at that hearing, but merely gave plaintiff an opportunity to apprise the court of the contours of his case. In this respect, the hearing was akin to a pretrial conference, which is generally conducted off the record. The court provided the services of a reporter for the convenience of the parties, and perhaps out of an abundance of caution.

In any event, nothing said at the February 21 hearing influenced the court's ruling on defendants' motion for summary judgment.

Time Limitations Imposed by the Court on the Hearing on the Motion for Summary Judgment

Plaintiff contends that he was prejudiced by the fact that the court limited the hearing on the motion for summary judgment to an hour and a half. He contends that he was prevented from presenting numerous witnesses and additional documentary evidence in response to the motion.

Again, plaintiff has failed to cite any authority to support his contention that he is entitled to unlimited devotion of the court's time on a motion hearing. Indeed, Local Rule 17(j) of this court provides that the court has discretion to deny oral hearings altogether on such motions.

Further, plaintiff has failed to describe what his witnesses would have testified to, and how their testimony was essential to his response. Indeed, if he sought to introduce testimentary evidence concerning defendants' access to his copyrighted works, that testimony would have been irrelevant, because defendants had conceded that issue for purposes of this

motion. In order to prevail on their motions, defendants had to demonstrate, and did demonstrate, the absence of a genuine issue of material fact concerning substantial similarity, which issue is independent from that of access. If plaintiff sought to introduce additional testimentary evidence that certain persons who viewed both plaintiff's works and defendants' campaigns believed that substantial similarity existed between the two, that testimony would have been irrelevant, for the reasons set forth supra regarding plaintiff's affidavits on this score.

Failure of the Court to Apply the Appropriate Test for Substantial Similarity

Plaintiff relies on the case of Sid & Marty Krofft Television v. McDonald's Corp., 562 F.2d 1157 (9th Cir. 1977), as he did in his response to the motion for summary judgment, for the proposition that the court must apply an "intrinsic test" to the question of whether or not a substantial similarity exists between the protected expressions of plaintiff's works, and the expressions of defendant's accused works. The Krofft court held that the alternative "extrinsic" test, used to test the similarity between "ideas", which are not protected by the copyright laws, should not be applied to test the similarity of expressions. Id. at 1165.

Plaintiff contends that the court employed the improper extrinsic test, and compared the dissimilarity between constituent elements of the two bodies of works, in reaching its conclusion that substantial similarity was absent. Plaintiff cites to the court's oral ruling on the motion, in which it noted the dissimilarity between the themes of the two bodies of works, and certain physical mediums for expression of those themes, such as hats, t-shirts, and license plates.

The court did indeed draw attention to the dissimilarities between these components of the two bodies of works. In so doing, it did not abandon the intrinsic test espoused by the Krofft court. Indeed, defendants did not challenge the application of Krofft to the facts of this case, and the court adopted the reasoning of that case in analyzing the motion for summary judgment. The court concluded, and indicated in its oral ruling, that there was no substantial similarity between the two bodies of works, taken either as integrated wholes, or as collections of their discrete elements such as the t-shirts, caps, and so on. In so doing, the court found that the defendant did not take

> from plaintiff's works so much of what is pleasing to the eyes and ears of lay persons who comprise the audience for whom such

> popular works are composed, (so) that defendant wrongfully appropriated something which belongs to plaintiff.

Krofft, supra, 562 F.2d at 1165 (citing Arnstein v. Porter, 154 F.2d 464, 472 (2d Cir. 1946), cert. denied, 330 U.S. 851, 67 S.Ct. 1096, 91 L.Ed. 1294 (1947)).

The fact that the two bodies of works were not substantially similar for purposes of the extrinsic test does not lead to the conclusion, either as a matter of logic or under the facts of this case, that those bodies were substantially similar for purposes of the intrinsic test. Indeed, the court found that they were not substantially similar under the intrinsic test.

For all the foregoing reasons, plaintiff's motion for reconsideration is denied.

Plaintiff's Motion to Extend Time to Serve Party Defendants

Plaintiff contends that, upon granting his motion for reconsideration, and reinstating the copyright claims in this case, the court should permit him to serve the amended complaint on the remaining media defendants named in that document who have yet to be served. Plaintiff contends that he has made a substantial showing that he will be prejudiced if he is enjoined from effecting such service.

Because the court continues to believe that the copyright claims are infirm as a matter of law, and that the original defendants were entitled to summary judgment on those claims, the proposed media defendants would have a perfect defense to those claims as well, under the law of the case. Further, plaintiff has made no showing that his non-copyright claims against any of these media entities would be prejudiced by denying him the opportunity to serve those entities at this time. Consequently, the motion is denied.

SO ORDERED.

/s/ CHARLES W. JOINER
HONORABLE CHARLES W. JOINER
U.S. District Judge

Dated: June 5, 1985

ATTACHMENT F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE MIHALEK CORPORATION and LAWRENCE PATRICK MIHALEK,

Plaintiffs,

Civil Action No. 84CV-7202AA

vs.

HONORABLE CHARLES W. JOINER

THE STATE OF MICHIGAN, GOVERNOR JAMES J. BLANCHARD, THE DEPARTMENT OF COMMERCE OF THE STATE OF MICHIGAN, RALPH J. GERSON, DIRECTOR,

Defendants.
_____/

ORDER

Defendants have filed a motion for summary judgment in this case, asserting that the plaintiffs have failed to demonstrate the existence of a genuine issue of material fact concerning the substantial similarity between plaintiffs' copyrighted works and defendants' accused works. The motion requests the court to undertake a side-by-side examination of the subject

materials. The motion was previously scheduled for hearing on Tuesday, April 16. In light of the fact that the motion will require an evidentiary hearing, and will not be limited to the oral arguments of the attorneys, the hearing is hereby rescheduled for Wednesday, April 17, at 3:30 p.m.

The court further orders the attorneys for the parties to meet and arrange for the presentation of physical evidence to the court during the hearing on the motion. Attorneys for plaintiffs shall have the responsibility of designating those items that compose Exhibit B to the motion, selected products of defendants' promotional campaign, that allegedly infringe particular copyrighted materials of plaintiffs. Plaintiffs' attorneys should therefore prepare the exhibits in such a manner that the court will best be able to discern any similarity between the copyrighted works and the accused works. All of the physical evidence that the attorneys agree to submit to the court for the hearing on defendants' motion should be brought to the court no later than 5:00 p.m., April 15.

SO ORDERED.

/s/ CHARLES W. JOINER
CHARLES W. JOINER
UNITED STATES DISTRICT JUDGE

Dated: March 26, 1985
Ann Arbor, Michigan

ATTACHMENT G

UNITED STATES DISTRICT COURT
FOR THE
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE MIHALEK CORPORATION and LAWRENCE PATRICK MIHALEK,

Plaintiffs,

v

THE STATE OF MICHIGAN, GOVERNOR JAMES J. BLANCHARD, THE DEPARTMENT OF COMMERCE OF THE STATE OF MICHIGAN, RALPH J. GERSON, DIRECTOR,

Defendants.
_____/

No. 84 CV 7202 AA

HONORABLE CHARLES W. JOINER

ORDER

At a session of said Court held in the Courtrooms, City of Ann Arbor, State of Michigan, on the _____ day of April, 1985.

PRESENT: HONORABLE CHARLES W. JOINER, U.S. District Judge

Defendants' Motion for Summary Judgment, having come on for hearing on April 17, 1985, and the parties

being represented by counsel, and the Court, after hearing oral arguments, testimony and reviewing the exhibits presented by both parties;

IT IS HEREBY ORDERED THAT Defendants' Motion for Summary Judgment, be and is hereby granted, for the reasons stated in this Court's Opinion which is incorporated herein by reference.

/s/ CHARLES W. JOINER
HONORABLE CHARLES W. JOINER
U.S. District Judge

ATTACHMENT H

UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE MIHALEK CORPORATION and LAWRENCE PATRICK MIHALEK,

Plaintiffs,

v

THE STATE OF MICHIGAN, GOVERNOR JAMES J. BLANCHARD, THE DEPARTMENT OF COMMERCE OF THE STATE OF MICHIGAN, RALPH J. GERSON, DIRECTOR, and ROSS ROY, INC.,

Defendants.
_____/

No. 84 CV 7202 AA

HONORABLE CHARLES W. JOINER

ORDER AND JUDGMENT
AS TO THE STATE OF MICHIGAN,
GOVERNOR JAMES J. BLANCHARD,
THE DEPARTMENT OF COMMERCE OF THE STATE
OF MICHIGAN, AND RALPH J. GERSON, DIRECTOR

Plaintiffs brought an original cause of action against the State of Michigan, Governor James J. Blanchard, the Department of Commerce of the State of Michigan, and Ralph J. Gerson, Director (hereinafter

"state defendants"), based on federal law alleging violations of copyright, trademark and Fifth Amendment; and

Plaintiffs sought to have this Court exercise pendent jurisdiction over state claims against state defendants alleging misappropriation of work product, trade secret and unfair competition; and

Plaintiffs removed to this Court the action entitled State of Michigan, et al v The Mihalek Corporation, et al, Livingston County Circuit Court No. 84-7310-CK; and

The state defendants brought various motions in relation to these actions; and

This Court considered the materials submitted by the state defendants, heard oral argument, and being fully advised in the premises; NOW

IT IS ORDERED that, in relation to the original action brought by Plaintiffs against state defendants in this Court on causes of action based on federal law,

1. The Motion For Summary Judgment in favor of state defendants on the copyright count was GRANTED because, as a matter of law, no substantial similarity exists between the protected works and the accused works.

2. The Motion For Summary Judgment in favor of state defendants on the trademark count is GRANTED because as a matter of law there is and can be no

confusion to the general public as to the source and origin of the works.

3. The Motion For Summary Judgment in favor of state defendants on the Fifth Amendment count is GRANTED because there was no taking of Plaintiffs' property.

4. JUDGMENT BE and it hereby is ENTERED in favor of state defendants on all counts setting forth claims based on federal law.

IT IS ORDERED that, in relation to those remaining claims against state defendants in the original action brought in this Court seeking to have this Court exercise pendent jurisdiction against the state, state agencies and state officials in their official capacity, that these remaining claims on the original action brought in this Court are in fact against the State of Michigan, and this Court is barred by the principle of sovereign immunity (11th Amendment) from exercising pendent jurisdiction over these claims, and these claims are DISMISSED WITHOUT PREJUDICE.

IT IS ORDERED that, in relation to the action originated in Livingston County Circuit Court which Plaintiffs (Defendants in the state action) removed to this Court that:

5. The motion by the state defendants for summary judgment on the claims setting forth an action on copyright, for which this Court has original and

exclusive jurisdiction, was GRANTED because as a matter of law, no substantial similarity exists between the protected works and the accused works.

6. JUDGMENT be and it hereby is ENTERED on the federal claims in favor of the state defendants.

7. This Court declines to exercise pendent jurisdiction over claims against state defendants which seek to set forth causes of action under state law, and such remaining claims are REMANDED to the Livingston County Circuit Court.

8. This is a final Judgment and closes the case.

/s/ CHARLES W. JOINER
HONORABLE CHARLES W. JOINER
U.S. District Judge

Dated: November 6, 1985

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION
ANN ARBOR UNIT

THE MIHALEK CORPORATION
and LAWRENCE PATRICK
MIHALEK,

Plaintiffs,

Case Number
84-CV-7202-AA

v.

ROSS ROY, INC.,

Defendant.
_____/

JUDGMENT IN A CIVIL CASE

This action came to hearing before the Court. The issues have been heard and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that judgment be and the same is hereby entered in favor of defendant ROSS ROY, INC., and against plaintiffs, THE MIHALEK CORPORATION and LAWRENCE PATRICK MIHALEK,

granting defendant's MOTION FOR SUMMARY JUDGMENT in an order dated October 22, 1985.

APPROVED:

/s/ CHARLES W. JOINER
CHARLES W. JOINER
UNITED STATES DISTRICT JUDGE

Dated: Nov. 6, 1985

/s/ ROBERT A. MOSSING
Clerk

/s/ JUDITH M. BIRDSALL
JUDITH M. BIRDSALL
Deputy Clerk

ATTACHMENT I

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

THE MIHALEK CORPORATION and LAWRENCE PATRICK MIHALEK,

Plaintiffs,

Case No. 84-CV-7202-AA

vs.

HONORABLE CHARLES W. JOINER

THE STATE OF MICHIGAN, GOVERNOR JAMES J. BLANCHARD, THE DEPARTMENT OF COMMERCE OF THE STATE OF MICHIGAN, RALPH J. GERSON, DIRECTOR, ROSS ROY, INC.,

Defendants.
_____/

STATE OF MICHIGAN)
) ss
COUNTY OF OAKLAND)

AFFIDAVIT OF LAWRENCE PATRICK MIHALEK

LAWRENCE PATRICK MIHALEK, being duly sworn, deposes and says:

1) That I am the creator of the property generally referred to as the "MICHIGAN IS GOOD NEWS" campaign.

2) That I presented the property of my ideas with notice of my property rights to the following officials of the State of Michigan:

1. Mr. Richard Schlaff, Executive Assistant to the Governor;

2. Mr. Craig Ruff, Executive Assistant to the Lt. Governor;

3. Mr. Frederick P. Dillingham, State Representative 51st District;

4. Mr. William Lukens, Acting Director of the Michigan Department of Commerce;

5. Mr. Dale Arnold, Deputy Director of the Michigan Department of Commerce;

6. Ms. Debi Hart, Special Assistant to the Director of the Michigan Department of Commerce Norton L. Berman;

7. Mr. Jack S. Wilson, Director of the Michigan Travel Bureau;

8. Mr. Bruce E. McComb, Deputy Director of the Michigan Travel Bureau;

9. Mr. John S. Staples, Contract Director of the Michigan Department of Commerce;

10. Mr. Gerald Williams, Director of Office of Management Practices;

11. Mr. Robert J. Scott, Director, Office of Film & Television Services, Department of Commerce;

12. Mr. Richard Lehman, Chief, Information and Education Division, Department of Natural Resources;

13. Ms. Margaret McCall, Chief-Communications Office, Department of Agriculture;

14. Mr. Jerry Dunn, Information Specialist, Communication Office, Department of Agriculture.

3) The following officials of the State of Michigan viewed my property at my residence and Corporate Headquarters in Brighton, Michigan:

1. Frederick P. Dillingham, State Representative 51st District, State of Michigan (twice);

2. Mr. Craig Ruff, Executive Assistant to Lt. Governor;

3. Mr. Dale Arnold, Deputy Director and Project Manager of the Development of the State of Michigan Advertising Campaign, Department of Commerce (see Exhibit A);

4. Ms. Debi Hart, Special Assistant to the Director of Michigan Department of Commerce;

5. Mr. Robert J. Scott, Director, Office of Film & Television Services, Michigan Department of Commerce;

6. Mr. Richard Lehman, Chief, Information and Education Division, Department of Natural Resources;

7. Mr. Jerry Dunn, Information Specialist, Communication Office, Michigan Department of Agriculture;

8. Ms. Margaret McCall, Chief Communications Office, Michigan Department of Agriculture;

9. Mr. Jack S. Wilson, Director, Michigan Travel Bureau, Michigan Department of Commerce;

10. Mr. Bruce E. McComb, Deputy Director, Michigan Travel Bureau, Michigan Department of Commerce.

4) That I am in receipt of a letter dated September 3, 1981 to the Honorable William G. Milliken from Frederick P. Dillingham (see Exhibit B).

5) I did not know nor did officials of the State of Michigan tell me that they were developing a new advertising and promotional campaign at the same time I was presenting my property to them. Had I known before-hand I would have not given them access to my property.

6) That upon my discovery that officials of the State of Michigan who had access to my property had hired a firm to develop a new advertising and promotional campaign, I immediately sought legal advice and wrote a letter to the Honorable William G. Milliken, dated September 28, 1981, which I hand delivered to the Governor's secretary (see Exhibit C).

7) That I received via United States Mail a letter dated September 29, 1981 from Governor William G. Milliken which directed me to work with Mr. Dale Arnold of the Department of Commerce and that it was

important that I keep them fully informed of my efforts (see Exhibit D).

8) That it was implied to me by Mr. Richard Schlaff, Executive Assistant to the Governor, Mr. Craig Ruff, Executive Assistant to the Lt. Governor, Frederick P. Dillingham, State Representative 51st District and Mr. Jack S. Wilson, Director of the Michigan Travel Bureau, Michigan Department of Commerce that I would receive a contract to become the instate promotional component of the "SAY YES TO MICHIGAN" campaign upon the funding by the Michigan Legislature. I would have not continued to give officials of the State of Michigan access to my property had I known that I would not be compensated.

9) I did not receive a contract from the State of Michigan after the funding by the Michigan Legislature.

10) I was told by Mr. Robert J. Scott, Director, Office of Film & Television Services, Michigan Department of Commerce, on or about November, 1981, that Mr. Norton L. Berman, director of the Michigan Department of Commerce "just warmed over" my concept.

11) I was told by Mr. Richard Lehman, Chief, Information and Education Division, Michigan Department of Natural Resources that the Michigan Department of Commerce was "plagiarizing" my ideas, in

meetings he was attending during the development of the "SAY YES TO MICHIGAN" campaign.

12) I was told by Mr. John Staples, Director of Contracts of the Michigan Department of Commerce, that he noticed similarity of my ideas in meetings he attended with officials of the Michigan Department of Commerce during their planning meetings.

13) I told Mr. Richard Schlaff, Executive Assistant to the Governor of the events as above described in Paragraphs 10, 11, and 12 and he told me to follow the Governor's letter as described in Paragraph 7.

14) That I presented a concept capable of pulling together both the public and private sectors of the State of Michigan in a very positive promotion of Michigan's economy to Michigan Officials.

That the State of Michigan used a concept of pulling together both the public and private sectors of the State of Michigan in a very positive promotion of Michigan's economy.

15) That I presented a series of illustrations of ideas which presented Michigan with a new and improved image as a good place to belong, live, work, go to school, do business and take a fun/rewarding vacation to Michigan Officials.

That the State of Michigan used a series of illustrations of ideas which presented Michigan with a

new and improved image as a place to live, work, vacation and conduct business.

16) That I presented a series of illustrations of ideas which demonstrated the use of an umbrella marketing and promotion approach that all State agencies, business organizations, associations, special singular interest groups and the Michigan State Legislature could support to Michigan Officials.

That the State of Michigan used a series of illustrations of ideas which demonstrated the use of an umbrella marketing and promotion approach that all State agencies, business organizations, associations, special singular interest groups and the Michigan State Legislature could support.

This information of the illustration of my concepts and ideas as above described was transmitted by Mr. Jack S. Wilson to the firm under contract (see Exhibit E), to develop a new advertising and promotional campaign.

17) That I presented a series of illustrations of ideas to Michigan Officials which the State of Michigan examples of which were used as follows:

1. Hats (Exhibits F & G)
2. T-Shirts (Exhibit H)
3. License Plates (Exhibit I)
4. Promotion of Michigan Products and Services (Exhibit J)

5. Telephone Company (Exhibit K)

6. Robot (Exhibit L)

7. Travel Display (Exhibit M)

8. Bumper Stickers

9. Mugs

18) That I delivered to the United States District Court for the Eastern District of Michigan, Southern Division, Ann Arbor, Michigan, to the chambers of the Honorable Charles W. Joiner, on April 15, 1985, numerous documents which showed the illustrations of the use of my ideas by the State of Michigan.

19) That I have not been compensated by the State of Michigan or any of its vendors nor did I receive any public credit by the State of Michigan for the use of my property.

20) That I did not give permission for the State of Michigan to use my private property and that I have and continue to suffer great irreparable harm because I have no control of the use of my private property by the State of Michigan and because I have not received just compensation.

21) That I am competent and stand ready to testify.

AND FURTHER this Deponent says not.

/s/ LAWRENCE PATRICK MIHALEK
LAWRENCE PATRICK MIHALEK

SUBSCRIBED AND SWORN TO before me this 23rd day of September, 1985.

/s/ JANICE E. BURKHARDT
JANICE E. BURKHARDT
Notary Public, Macomb County, MI
My Commission Expires Sept. 10, 1986
Acting in Oakland County

SEAL

ATTACHMENT I, EXHIBIT A

THE MIHALEK CORPORATION, Lawrence Patrick Mihalek and James M. Deimen,

Defendants.
_____/

AFFIDAVIT OF DALE J. ARNOLD

STATE OF MICHIGAN)
) ss
COUNTY OF INGHAM)

I, DALE J. ARNOLD, being duly sworn, depose and state:

1. I am a public affairs officer of the Department of Commerce and I have held that position since December, 1983.

2. From June, 1981, until December, 1983, I was Deputy Director, Public Affairs, of the Department of Commerce and as such, was responsible for helping administer the planning and initial execution of the State's promotional campaign called Say Yes to Michigan.

3. I attended a presentation staged in the basement of Lawrence Patrick Mihalek, in late 1981, in which Mr. Mihalek described ideas for a Good News promotion of the State, based primarily on display

modules erected in shopping malls to cite facts about state government agencies' services to Michigan citizens.

4. I have reviewed U.S. copyright materials provided me by the Michigan Attorney General's office relating to the promotional program.

5. Only a portion of this material was involved in the 1981 presentation in Brighton. I took no notes on the presentation and had no written materials from the meeting and so my statement here is based on memory of that occasion three years ago.

/s/ DALE J. ARNOLD
Dale J. Arnold
Michigan Department of Commerce

Subscribed and sworn to before me
this 24th day of October, 1984

/s/ DeLYNN M. KENDZIORSKI (PETTIT)
DeLynn M. Kendziorski (Pettit)
Notary Public, Delta County, Michigan
Acting in Ingham County, Michigan
My Commission Expires November 12, 1985.

ATTACHMENT I, EXHIBIT B

HOUSE OF REPRESENTATIVES
LANSING, MICHIGAN

51ST DISTRICT
FREDERICK P. DILLINGHAM
OFFICE THE STATE CAPITOL
LANSING, MICHIGAN 48909

124 BENJAMIN STREET
FOWLERVILLE, MICHIGAN 48836

September 3, 1981

The Honorable William G. Milliken
Governor, State of Michigan
Executive Office
State Capitol
Lansing, Michigan 48909

Dear Governor Milliken:

I am writing to you on behalf, and in support of, L. Patrick Mihalek of Brighton who has developed a Michigan promotional concept entitled, Michigan is "Good News." I have personally reviewed this concept on two different occasions and I feel it has a great deal of merit.

This concept is capable of pulling together both the public and private sectors of our state in a very positive promotion of Michigan's economy. Mr. Mihalek has done extensive research of every promotional aspect of state government, and his idea demonstrates and coordinates both the private and public sector in a manner that I feel will create a public feeling that Michigan is not "doom and gloom," but that we are a state with pride and

resources far exceeding other areas of the country. This concept has also been viewed by key people within state government and it is my understanding that they are equally impressed.

I feel this program must be viewed by you personally, and I am requesting an hour appointment with Mr. Mihalek and myself to present his idea to you for your personal evaluation as soon as possible.

Thank you in advance for your kind consideration of this extremely important matter.

Sincerely,

/s/ FREDERICK P. DILLINGHAM
FREDERICK P. DILLINGHAM
State Representative

FPD/gs

ATTACHMENT I, EXHIBIT C

THE MIHALEK CORPORATION™
"Results in Promotions"

Patrick Mihalek
President

HAND DELIVERED TO
GOVERNOR'S SECRETARY

September 28, 1981

The Honorable William G. Milliken
Governor, State of Michigan
Executive Office
State Capitol
Lansing, Michigan 48909

Dear Governor Milliken:

Looking forward to hearing some "good news" from you, at our up and coming meeting, that your "Good News™" hat and shirt were the right size.

I was extremely impressed with your address to the joint session of the Legislature on September 17, 1981. The most salient points of your speech involved your ideas that, "There are many 'good news' stories about Michigan's economy" and "I propose that we tell the world about Michigan." I totally agree with your approach that this potential "Good News™" about Michigan will have a lasting impact on the attitudes, images and rewards that people of the world perceive Michigan to be. I was pleasantly surprised that we both arrived at the same

conclusion and philosophy without having any direct communication between us.

I also believe that the bonding agent that will bring about the new "Michigan Momentum" was summarized in your statement that, "The question is not whether one side or another can come out on top in a series of self-serving maneuverings. Rather, it is whether we can rise above all other considerations to work together toward a common goal."

I want to take this opportunity to "Thank" your staff and the hundreds of State of Michigan's employees from department heads to secretaries that worked with me in the developing stages of the "Good News™ is Michigan" project. These people have spent hundreds of combined man hours of effort, talent, and support in supplying and researching volumes of information about Michigan over the past twelve months.

I wish you would personally "Thank" Mr. Richard Schlaff for his sincere cooperation, understanding, guidance and moral support during this time period. His "You can make it attitude" is a positive asset to your staff.

A "Thank You" to State Representative Fred Dillingham for his eight months of active support. He was a guiding force for setting meetings up in his office and at my personal residence in Brighton, Michigan with key people in our State Government. (See attachment for list of names) These meetings were for the purpose of presenting the total knowledge of the idea from philosophy, concept, research, development, implementation procedures, and projected result of the "Good News™ is Michigan" promotional program. This people participation promotion communicates and educates the world about Michigan's positive assets and advantages.

A "Thanks" to over 3,000 citizens of Our Great State of Michigan who shared with me their attitudes and desires about Michigan.

A "Thanks" to the people of Indiana and Ohio for their impressions about Michigan.

A "Thanks" to my family, friends, neighbors, and business associates who have supported me from day one through completion of my original idea called "Good News™ is Michigan".

Governor Milliken, I wish you would "Today", give a special "Thank You" to Mr. Robert Law for his cooperation and support for trying to untangle a system oversight that has put a temporary hold on a special request addressed to you, from State Representative Fred Dillingham dated September 3, 1981, and supported by a memo from the Lt. Governor's Office. However, this three and one-half weeks of oversight has been used to build additional positive potential private sector support of over one-half million dollars.

Before I close this letter, I would like to state that it is my belief that the same "Michigan Spirit" that put the "World on Wheels", supplied the "Arsenal of Strength" during World War II, will surface again to meet the challenges and demands of the 1980's. This "Innovative Michigan Spirit" has been a long time tradition of Michigan, because Michigan's greatest assets are its people.

It is with this "Michigan Spirit" that I, as a Michigan citizen, have spent one year full time, over 3,500 personal man-hours, 122 trips to Lansing, hundreds of telephone calls through our State gathering information and support, and personal out-of-pocket expenses of $74,231.00 in the development of this project called "Good News™ is Michigan".

I now need your knowledge, support and action!

Thank you in advance for your valuable time in handling this important matter and for scheduling a meeting between us in your busy schedule as soon as possible.

Sincerely,

/s/ L. PATRICK MIHALEK
L. Patrick Mihalek

/s/ ROBERT C. KLINE
ROBERT C. KLINE
Notary Public, Livingston County, Michigan
My Commission Expires October 15, 1984

Attachment

ATTACHMENT

The following people viewed the project at my personal residence in Brighton.

Mr. Frederick P. Dillingham, State Representative 51st District
Mr. Craig Ruff, Executive Assistant to Lt. Governor
Mr. Dale Arnold, Deputy Director-Department of Commerce
Ms. Debi Hart, Special Assistant to the Director of Department of Commerce
Mr. Robert J. Scott, Director, Office of Film & Television Services, Department of Commerce
Mr. Richard Lehman, Chief, Information and Education Division, Department of Natural Resources
Ms. Margaret McCall, Chief-Communications Office, Department of Agriculture
Mr. Jerry Dunn, Information Specialist, Communication Office, Department of Agriculture

One of the key meetings in Mr. Dillingham's office was held in the month of May, and the following people were in attendance.

Mr. Frederick P. Dillingham, State Representative 51st District
Mr. William Lukens, in his capacity as the Acting Director of Commerce
Mr. Craig Ruff, Executive Assistant to Lt. Governor
Mr. L. Patrick Mihalek, President, The Mihalek Corporation

/s/ L. PATRICK MIHALEK

/s/ ROBERT C. KLINE
ROBERT C. KLINE
Notary Public, Livingston County, Michigan
My Commission Expires October 15, 1984

ATTACHMENT I, EXHIBIT D

STATE OF MICHIGAN
OFFICE OF THE GOVERNOR
LANSING

WILLIAM G. MILLIKEN
Governor

September 29, 1981

Mr. L. Patrick Mihalek
President
The Mihalek Corporation
P. O. Box 5148
Dearborn, Michigan 48128

Dear Mr. Mihalek:

I appreciate the time and effort you have put into your project promoting the good things about Michigan. I know that you have patiently sought a meeting with me in order to present your proposal. I regret that with the legislative session and development of our economic recovery proposal I simply have not had the opportunity to see you.

Because of the many demands on my schedule in the coming weeks, I think it would be best if you were to continue to work with Mr. Dale Arnold of the Department of Commerce. As you know, I am recommending a substantial increase in state funding for the promotion of Michigan. After discussions with a professional consulting firm, the Department of Commerce will be recommending to me a comprehensive plan for promoting Michigan. I will be relying heavily on their advice and expertise. It is important, therefore, that you keep them fully informed of your efforts.

Again, I regret that we could not personally discuss your promotional program.

Kind personal regards.

Sincerely,

/s/ WILLIAM G. MILLIKEN
Governor

ATTACHMENT I, EXHIBIT E

MARKETING MICHIGAN

Present Situation

1) A growing number of residents, businesses, organizations, state agency personnel are tired of always hearing "bad news" about Michigan. Those who have and continue to make a commitment to live and work or do business in Michigan want and need psychological reinforcement for their decision to stay here.

2) The state desperately needs a "good news" story.

3) If properly developed and presented, the business community, the legislature, the media and state agencies would gladly join a "good news" promotional effort.

4) Immediate action is needed — not a several month research and planning effort.

Objectives

1) To generate a new and improved image for Michigan as a place to live, work, do business and vacation.

2) To develop an umbrella marketing and promotion approach that all state agencies, business,

organizations and groups, and the legislature can support, be a part of, and feel good about.

3) To secure immediate broad based support for the umbrella approach including:

- Private sector cooperation and participation.
- Media support and participation.
- Legislative support, participation, and funding.
- State agency support and cooperation.
- Public support.

Strategy and Plan

1) Use tourism as basis for good news story — it's one of the best things the state has going for it right now.

2) Develop new promotional theme and action plan.

- Directly involve wide variety (200-300) people (small businesses, big businesses, tourism businesses, media and key legislators).
- Non-partisan approach necessary.
- Use consultants as facilitators and communicators to work with structured discussion groups. The groups would be responsible for identifying:

° positive attributes of Michigan.

° alternative promotion themes (3-5)

- Research would be used to test (instate and out of state) reaction to theme alternatives. The groups would review the result of the research and select a final concensus theme.

3) Timing

- Have theme and immediate steps that can be taken, ready to go by September 15th and implement at that time to build momentum and get the program going before it becomes too politically sensitive.

- Complete other aspects of plan as needed for major 1982 warm weather campaign.

- Use momentum, private sector and legislative involvement to encourage legislative action on funding.

4) Most Critical Part of Strategy

- Obtain broad based involvement including legislature and key opinion leaders from business, industry and the media from start. This will produce a wide spread feeling of being part of something positive and develop commitment to fully implementing the program.

- Take advantage of present desire for good news — act now.

- Major personal involvement by Governor to secure commitment and cooperation of opinion leaders of state.

(initially by Jack Wilson - 7/20/81)

ATTACHMENTS F THROUGH M

Note: Exhibits F through M (pictures) not included in bound petition at suggestion of Chief Deputy Clerk of the Supreme Court. See original record.